IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.127 OF 2005

WITH

CRIMINAL APPLICATION NO.3172 OF 2005.

Ashok Gyanchand Vohra ... .. Petitioner

Vs

The State of Maharashtra & Anr. .. Respondents.

WITH

CRIMINAL WRIT PETITION NO.1449 OF 2005

Shabbir N.Patel... .. Petitioner

Vs

The State of Maharashtra & Anr. .. Respondents.

WITH

CRIMINAL APPLICATION NO.6297 OF 2005

IN

WRIT PETITION NO.127 OF 2005.

Ketan Tirodkar ... . Intervenor

Vs

The State of Maharashtra .. Respondents.

WITH

CRIMINAL WRIT PETITION NO.1956 OF 2005

Shri R.M.Dhariwal ... .. Petitioner

Vs

C.B.I. & Ors. ... .. Respondents.

WITH

CRIMINAL WRIT PETITION NO.2016 OF 2005

Jagdish M.Joshi ... .. Petitioner

Vs

C.B.I. & Ors.... .. Respondents.

WITH

CRIMINAL WRIT PETITION NO.2065 OF 2005

Tariq Abdul Karim Parveen.. .. Petitioner

Vs

State of Maharashtra... .. Respondent.

Mr R.M.Agarwal with Mr A.M.Sarogi and Mr Girish Agarwal, for the petitioner.

Mr Ravi Kadam, Advocate General, with Mr S.R.Borulkar, Public Prosecutor with Smt P.H.Kantharia, A.P.P. and Mr D.S.Mahispurkar, APP i/by Government Pleader for respondent no.1-State.

Ms Asmita Sarangdhar for respondent no.2 in W.P.No.127/05 and for the applicant in Cri.Application No.3172 of 2004

Mr Sushilkumar, Senior Counsel with Mr S.K.Jain, Mr Rajendra Shirodkar, H.Jain, Lalit Chavan and K.Damle i/b M/s Udwadia Udeshi & Co., for the petitioners in Writ Petition No.1956 of 2005.

Mr Shirish Gupte, Senior Counsel, with Mr A.P.Mundargi and Mr S.Gole, for the petitioner in Writ Petition No.2016 of 2005.

Mr S.R.Chitnis, Senior Advocate with Mr G.Kulkarni and Mr H.Wadake, for the petitioner in Writ Petition No.2065 of 2005.

Mr Prakash Naik, for respondent no.3 in Writ Petition No.1449 of 2005.

Mr Amit Desai, Senior Counsel with Mr Subodh Desai and Mr G. Shenoy i/b M/s.Dhruve Liladhar & Co, for the petitioner in Writ Petition No.1449 of 2005.

Mrs S.S.Matti, for the applicant in Cri.Application No.5984 and 6293 of 2005.

Mr Ketan Tirodkar in-person as applicant in Cri.Application No.6297 of 2005.

Mr Samir A.Vaidya, for the petitioner in Writ Petition No.974 of 2005.

Mr V.M.Pradhan, for Intervenor in Cri.Application No.6399 of 2005.

Mr V.M.Thorat, for the applicant in Cri.Application No.6433 of 2005 and in Writ Petition No.2065 of 2005.

CORAM : V.G.PALSHIKAR Acg.C.J.,

D.B.BHOSALE AND V.K.TAHILRAMANI,JJ.

DATE : 22ND DECEMBER, 2005

Oral Judgment:(Per Palshikar, J.)

1. The above writ petitions were heard by us and the judgment was reserved. Then I prepared the judgment of the Bench in November, 2005 and circulated it to my

learned colleagues on the Bench. However to my dismay, I was informed by both my colleagues that they do not agree with the view taken by me on the presumption that they agree with me. I then read the majority view rendered by Hon'ble Shri Justice D.B. Bhosale. Having given my anxious consideration to the views expressed I found it impossible to agree with the majority view. Hence this opinion.

2. I regret my incapacity to convince my learned colleagues to the view that I propagated. In my humble opinion, the majority view has the result of virtually destroying the safeguards provided under the MCOC Act. The majority view reads several things into the Act which are not legislated. It has the effect of permitting the Special Court under the Act not only to take cognizance of private complaint alleging commission of offences under the MCOC Act and order investigation under section 156(3) of Criminal Procedure Code when section 23 of the MCOC Act specifically bars it.

3. Special Court is not a Court of Sessions as defined by the Code. Section 156 specifically contemplates Magistrate empowered under section 190 of the Code. Section 190 of the Code speaks only of Magistrate. What Magistrate means is defined by the

Code and Special Court 'as defined by sections 5 and 6 certainly is not a Magistrate. But for the provisions of sections 5 and 6 of the MCOC Act the Special Court contemplated by the Act does not come into existence. It is not in the hierarchy of Courts mentioned in the Criminal Procedure Code. It is not a Court of Magistrate. It is not Court of Sessions. Section 156 specifically contemplates Magistrate as defined by Criminal Procedure Code. The majority view has in effect held that Special Court constituted under sections 5 and 6 of the MCOC Act is a Magistrate as defined by Criminal Procedure Code for the purposes of exercising powers under section 156. Such construction is impermissible under any established principle of statutory interpretation.

4. According to the majority view wherever legislature intended to prohibit use of the provisions of Criminal Procedure Code, 1974 it has specifically said so with non-obstante clause. Such clause is absent in section 9 and therefore a Special Court functioning under section 9 can act under section 156 and order inquiry under section 156(3) though it is not a Court of Magistrate as defined by the Code. Necessary corollary of this view would be that provisions of section 190 of Criminal Procedure Code 1974 would apply which

specifically prohibits a Court of Sessions which is the Court of original jurisdiction as is the Special Court under MCOC Act from taking cognizance without committal proceedings. If because of absence of non-obstante clause provisions of Criminal Procedure Code 1974 are to be applied under section 9 then provisions of section 190 also must apply and committal of proceedings would become necessary. The Legislature knew this legal position and therefore put the clause under section 9 which permits a Special Court under the Act to take cognizance without committal proceedings. In effect according to the majority view a Special Court can direct investigation under section 156(3) of the Code and can take cognizance of the matter inspite of bar under section 23 of the Act.

5. The natural consequence of the majority opinion would be that any private citizen by mere allegation of possible commission of the offences under the Act can put the machinery of the State into motion persuading the Special Court to make order under section 156(3) when that machinery cannot be put into motion by the police themselves unless there is an approval under section 23(1) of the Act. It provides that even information regarding offences would not be recorded unless it is approved or sanctioned by a designated

officer. Thus, that which cannot be done even by the Government of Maharashtra by reason of specific prohibition imposed by the Act can be done by a Magistrate on a complaint by private citizen by taking recourse to section 156 of the Criminal Procedure Code though that Special Court is not a Magistrate or Court of Sessions as contemplated by Criminal Procedure Code 1974. According to the majority view therefore if police wants to record information regarding commission of offence under the Act it will have to take prior approval of the designated officer under section 23(1) before so recording the information but the police will have to do it on complaint made by a private person to a Special Court. In effect the bar provided by section 23 would only partially operate, it will prevent police from taking any action without prior approval but will be required to take it inspite of that section when the complaint is made to a Special Court and he issues a direction under section 156 (3). All that is provided by section 9(1) of the MCOC Act in effect is empowering a Special Court to take cognizance after sanction is granted under section 23(2) without there being any committal proceedings as contemplated by section 190 of Criminal Procedure Code. The effect of the majority view would thus run counter to the provisions of section 156(3) and section 23 of the Act.

6. The direction to issue under section 156(3) to investigate is issued to Station House Officer of the concerned police station. He undoubtedly has the power of requesting that the investigation be taken up by Senior Officer but he can choose to do it himself which would be in clean violation of provisions of section 23(1) which contemplates an investigation by a person not below the rank of Superintendent of Police without prior approval of the Director General of Police.

7. The majority view in my opinion, substitutes or alters the provisions of section 9(1) and section 23. It nullifies section 23(1) and permits the Special Court to take cognizance inspite of the embargo put by section 23(2). It thus strikes down the provisions of section 23(2) to a large extent without there being any prayer to that effect. It is for these reasons that I am unable to agree with the majority view.

8. According to me the question referred has to be answered as under :

> **Q. Whether in a private complaint filed under the provisions of Section 9(1) of the Maharashtra Control of Organized Crime Act, 1999**

designated Court is empowered to order investigation under section 156(3) of the Code of Criminal Procedure before approval/sanction is granted to investigate and take cognizance as contemplated under section 23 of the said Act?

A. A designated Court under the MCOC Act does not have the power to direct investigation under section 156(3) of the Criminal Procedure Code in view of the provisions of sections 9 and 23 of the MCOC Act.

My reasons for coming this conclusion are as follows:

. In this petition Hon'ble Shri Justice V.M. Kanade on 23.3.2005 made an order requesting the Chief Justice of Bombay High Court to constitute a larger bench to resolve the conflict which according to the learned Judge existed in the views expressed by two Division Benches of this Court in Criminal Appeal No.1451 of 2004 and Criminal Writ Petition No.1772 of 2004. He had framed the following question for adjudication by the larger bench. The question reads thus:

i) Whether in a private complaint filed

under the provisions of Section 9(1) of the Maharashtra Control of Organized Crime Act, 1999 designated Court is empowered to order investigation under section 156(3) of the Code of Criminal Procedure before approval/sanction is granted to investigate and take cognizance as contemplated under section 23 of the said Act?

9. I have heard the learned counsel appearing for various parties who put forward their views on several aspects touching the above question. Facts giving rise to this reference stated briefly are that Criminal Appeal No.1451 of 2004 was heard by the Division Bench of this court presided over by Hon'ble Shri Justice S.B. Mhase. It was dealing with conviction under the provisions of Prevention of Terrorism Act, 2002 in an appeal in Criminal Appeal No.1451 of 2004. While deciding the appeal the Division Bench came across the judgment delivered by a Single Judge of this Court which is reported in 2004 All Mah. Reports (Criminal) 1689. Though the division bench was considering several contentions raised before it in the appeal under the Prevention of Terrorism Act, it also considered similar provisions under the Maharashtra Control of Organised Crime Act, 1999 (MCOC) because the similarity was almost identical. After considering the provisions the

division bench led by Justice Mhase specifically disapproved the judgment in Dayanand Nayak's case reported in 2004 All Mah. Reports 1689 (hereinafter referred to as Dayanand Nayak's case) and observed that ordering investigation under section 156 of the Code of Criminal Procedure in a private complaint filed under section 9(1) of the MCOC Act is rendering the provisions which required approval for investigation and sanction for prosecution redundant. This judgment was pronounced by the division bench on 21.12.04. The ratio of this judgment, in our opinion, is that no action under the provisions of the Prevention of Terrorism Act, 2002 can be taken unless there is prior approval for investigation and sanction for prosecution as contemplated by the provisions of that act. The necessary provisions of the Prevention of Terrorism Act are contained in sections 29, 50 and 58(1) of that act, which according to the bench are similar to the provisions of sections 9 and 23 of the MCOC Act.

10. Criminal Writ Petition No.1772 of 2004 arose out of the provisions of MCOC Act and the order questioned therein was the order passed by a designated court presumably under section 9 of the MCOC Act directing the designated Judge to deal with matters a fresh in the light of the observations made by the division bench in

that judgment. However asserting that the Special Judge can take cognizance of the complaint only after requisite sanction is granted by sanctioning authority petition was accordingly disposed of. By necessary implication the order of the division bench deciding the writ petition held that though cognizance of a private complaint filed before the designated court cannot be taken without previous sanction of the competent authority investigation under section 156(3) of Cri. P.C. could be ordered. This judgment was pronounced on 22.12.2004 i.e. on the next day the judgment in Criminal Appeal No.1451 of 2004 was pronounced. The fact that a division bench of this Court on 21.12.2004 had specifically overruled the Judgment in Dayanad Nayak's case could not be brought to the notice of the division bench presided over by Hon'ble Smt.Justice Ranjana Desai which decided Criminal Writ Petition No.1772 of 2004. While so deciding the division bench was naturally unaware of the fact that factually the decision of the learned Single Judge Justice Marlapalle stood specifically over ruled by division bench of this Court on 21.12.2004. They consequently proceeded to pronounce their judgment on 22.12.2004 that a Magistrate can order investigation under section 156(3) of the Cri. P.C. But cannot take cognizance of the complaint of offences mentioned therein unless sanction of the

competent authority under section 23 is obtained.

11. Justice Kanade while he was hearing above Criminal Writ Petition No.127 of 2005 had the occasion to consider both the judgments, one dated 21.12.2004 and other dated 22.12.2004. He by his well reasoned concise order brought out the differences between the two orders, nailed the conflict which obviously existed between the two, noticed the factual position due to existence of which the conflict might have arisen and proceeded to make reference to the Hon'ble Chief Justice as sequel of which our bench was constituted and I have heard the matter in details apart from hearing learned advocates appearing for various parties, I also heard Shri Ketan Tirodkar who sought to intervene in this matter on the ground that it was his complaint which ultimately culminated in the judgment of Dayanand Nayak's case and also other interveners who pointed out to us during the course of arguments the necessity of holding private complaint under section 9(1) maintainable to avoid atrocities of the police under the provisions of MCOC Act. I will notice all the arguments of the learned counsel at proper places.

12. I will now notice the facts giving rise to the present Criminal Writ Petition No.127 of 2005 in which

this reference to Full Bench is made. I may also incidentally note that during the pendency of this full bench for hearing several such cases ultimately raising the question of maintainability of a private complaint under section 9(1) of MCOC Act were filed in this Court and ultimately were referred for adjudication along with this petition being Criminal Writ Petition No.127 of 2005. I have also heard the learned advocates appearing for parties in each of them. Intervenors were also permitted to submit their say generally in all cases.

13. The Special Judge which actually is designated under the provisions of the MCOC Act, Shri A.P. Bhangale was trying Special Case Nos.243 of 2004 and 258 of 2004 against the accused under the provisions of the MCOC Act. During the continuance of the trial application was filed by one Nitendra Singh Patil in the shape of complaint of offences under MCOC Act and Indian Penal Code conjointly. The complaint/application was basically targeting several officers of the Bombay Police who according to the complainant have committed certain offences as defined in the MCOC Act, in addition to having committed several other offences under the provisions of Indian Penal Code. It would be necessary for proper appreciation and adjudication of the above referred question to note the prayers made in the

application :

"1. Hon’ble Court may be pleased to take the cognizance of the complaint and process may be issued against all the accused above named OR alternatively direct the competent police authority to register the Complaint under Section 3(2), 3(3), 3(4), 3(5) 4 and 24 of MCOCA & Section 120B, 143, 147, 149, 166, 182, 191, 192, 193, 195, 196, 218 & 323 read with 34 of I. P. C.

2. Hon’ble Court may be pleased to allow the complaint to rely on the averments made and information given in the envelope as part and parcel of this Complaint.

3. Hon’ble Court may be pleased to call upon criminal record of all the Accused persons mentioned in the complaint.

4. Hon’ble Court may be pleased to call upon all the documents of investigation made by the Anti Corruption Bureau in CR No.II 3071/2003 registered at Thane Nagar Police Station, Thane.

5. Hon'ble Court may be pleased to call upon all the documents of the investigation of CR No.I 74/2003 registered at Kasa Police Station, Thane Rural.

6. Hon'ble Court may be pleased to pass any order in favour of the Complaint; in the interest of justice.

14. It will thus be seen that the complainant in this application clearly prayed for the Hon'ble Court to take cognizance of the complaint and issue process thereon as contemplated by law. The learned Judge entertained this complaint, recorded evidence even before taking cognizance of framing charge that is to say followed the procedure contemplated by section 202 of the Criminal Procedure Code and directed the Commissioner of Police (Crimes) Mrs.Meera Borwankar to investigate into the allegations made in the complaint, he ordered the manner in which the investigation should be undertaken by Mrs.Borwankar, directing constitution of Special Investigation Team and commanded them to report under section 156(3) of Cri. P.C.

15. This order was impugned before this Court in Criminal Writ Petition No.1772 of 2004 of which judgment

was delivered by the division bench led by Justice Smt. Ranjana Desai on 22.12.2004 holding that though cognizance of private complaint under section 9 cannot be taken without sanction as contemplated by section 23 of the MCOC Act the designated Judge or the Special Judge appointed under the act could order investigation under section 156(3) of Cri. P.C. The order therefore quashed the order directing constitution of the Special Investigation Team under the leadership of Mrs.Borwankar and directed consideration of the matter afresh. This was then undertaken by Special Judge Shri Bhangale who then passed the impugned order dated 10.1.2005 directing investigation by the police in accordance with the observations made by the division bench judgment dated 22.12.2004 in Writ Petition No.1772 of 2004. It is this order of the Special Judge which was impugned before the learned Single Judge Hon'ble Shri Justice V.M. Kanade and while dealing with rival contentions in this petition that he noticed the conflict as aforesaid and made reference which I will now proceed to consider.

16. Criminal jurisprudence of this country is almost in its entirety a British Legacy. Indian Penal Code defining various offences that can be committed providing punishment for commission of those offences came into existence as back as in the year 1860. It

covered almost all kinds of possible offences that can be committed in our country. As the Society and Statehood developed criminality also developed and offences which could not be covered by the definitions provided in the Indian Penal Code were being committed giving rise to an urgent need of legislations to take care of such criminals committing such crimes which during the last 150 years gave birth to various other special legislations taking into consideration the diversifying aspects of crimes coming into existence prior to and after independence of India. It is not necessary to dilate any further on this aspect and it will be sufficient for our purposes to state that legislation of the Maharashtra Control of Organized Crimes Act, 1999 was one such legislation needed to prevent and destroy organized crime within the State of Maharashtra. This obviously is a special legislation created to take care of the crimes and special kind of criminals perpetrating those crimes as the normal law laid down in Indian Penal Code and the procedure in which the trials could be made under the Criminal Procedure Code, 1973 was considered grossly inadequate to deal with such special kind of offences. It is therefore a very strict and effective piece of legislation designed to effectively prevent the commission of organized crimes in the State of

Maharashtra. This aspect that it is special legislation created for special purpose is of strict criminal nature of strict penal effects will have to be kept in mind while interpreting provisions of this act along with provisions of normal law of procedure and crime.

17. Except for such special legislations as MCOC Act, Prevention of Terrorism Act, the repelled Terrorists and Dangerous Activities act etc. all crimes covered by the Indian Penal Code are required to be tried by all encompassing well laid procedure contained in the Criminal Procedure Code, 1894 which enactment was replaced by Criminal Procedure Code, 1973 and which presently is the Code which regulates the procedure for criminal trials in India. The Indian Penal Code and the Criminal Procedure Code are necessarily therefore the general legislations covering the entire field of crimes and punishment and procedure only exception being special enactments created to meet special situations provided special procedures. I have to keep this aspect of general law and the aspect of special law mentioned earlier in mind for correctly approaching the question under reference.

18. The Indian Penal Code 1860 defines various offences and various punishments. Definitions are

contained in Chapter II. The doctrine of punishment in criminal jurisprudence is encoded in Chapter III. Chapter IV provides general exceptions. Chapter V deals with abetment of offences and from Chapter VA states the definition and punishment of various offences. Categories or classifications of offences have been made. Chapter VI deals with offences against the State. Chapter VII deals with offences relating to the army, navy and air force. Chapter VIII deals with offences against the public tranquility. Chapter IX deals with offences by or relating to public servants. Chapter IXA relates to offences relating to elections. Chapter X deals with offences pertaining to contempt of lawful authority of public servants. Chapter XI deals with offences of false evidence and offences against public justice. Chapter XII deals with offences relating to coin and Government stamps. Chapter XIII deals with offences relating to weights and measures. Chapter XIV deals with offences affecting the public health morality etc. Chapter XV deals with offences pertaining to religion. Chapter XVI deals with offence affecting the human body. Chapter XVII deals with offences against robbery. Chapter XVIII pertains to offences relating to documents and property marks. Chapter XIX deals with offences pertaining to criminal breach of contracts. Chapter XX deals with offences relating to marriage.

Chapter XXI deals with offences of defamation. Chapter XXII deals with criminal intimation etc. It will thus be seen that the entire Indian Penal Code defines and prescribes punishment for various kinds of offences touching almost all aspects of human life.

19. The procedure of conducting the trial and punishing those persons who have committed offences under the Indian Penal Code is prescribed by Criminal Procedure Code. It also exhaustively deals with what procedure should be for conducting trial on any of the offences mentioned in the Penal Code. I will therefore notice those provisions which deal with conduct of such trials, hierarchy of Courts and the procedure of taking cognizance as provided by this act. However before proceeding with that exercise it is necessary to note the schedule to the Code which gives in nut shell a chart regarding the offences, punishment whether its cognizable, bailable or non-bailable and by which Court it is triable. In this schedule all the offences mentioned in the Indian Penal Code are stated. Ultimately it provides for classification of offences under other laws and states how they are to be tied, whether they are cognizable or not, states the Court which can try them. This part of schedule therefore takes care of offences not defined in the Indian Penal

Code but are made offences by any other legislation in the country which creates the offence, prescribes the punishment but does not provide procedure with which the trial is to be conducted. Care is therefore taken to provide procedure and trial of such offences also. Legal position in this regard is well settled. Wherever there is special procedure prescribed by special enactment then the procedure so prescribed shall prevail over the general procedure. In the instant case it is MCOC Act and the procedure laid down by it which will prevail over the general procedure prescribed in the Criminal Procedure Code, 1973. I will presently notice how the MCOC Act creates a complete procedure for conduct of investigation and trial of offences created by it.

20. Section 2(d) of the Criminal Procedure Code, 1973, hereinafter referred to as "Code" defines what the complaint is. According to it a complaint means any allegation made oral or in writing to a Magistrate with a view to his taking action under this Code that some person has committed an offence. It will be seen that complaint is an allegation made to the Magistrate recording commission of offence and that Magistrate taking action under this Code in relation to those allegations. In Criminal Jurisprudence wherever the

word "complaint" is not defined it would be necessary to read this definition for understanding what a complaint is. The word "complaint" is used in section 9 of the MCOC Act but is not defined there and therefore it will have the meaning given to it by section 2(d) of the Code.

21. Section 2(g) of the Code defines what an inquiry is. It means every inquiry other than a trial conducted under this Code by a Court or a Magistrate. Therefore every enquiry under any provision of the act other than a trial is to be undertaken by the Court or Magistrate as defined by the Code. Here the words "Court" and "Magistrate" are to be kept in mind.

22. Section 6 of the Code provides for classes of Criminal Courts, that shall be constituted under the law. As of necessity therefore criminal courts in India apart from the High Court can be Court of Sessions, Court of Judicial Magistrate and Court of Metropolitan Magistrate. These therefore are the Courts or Magistrates who can direct inquiries as defined by section 2(g) in any matters. It does not therefore encompass or contemplate any other Court of criminal jurisdiction than those defined in the Code.

23. However after enactment of the MCOC Act in 1999 Special Courts are required to be established as a matter of procedure prescribed by that act. After coming into force of this act therefore in the State of Maharashtra there would be four courts; (i) Court of Sessions, (ii) Court of Judicial Magistrate; (iii) Court of Metropolitan Magistrate and (iv) Special Court constituted under section 5 of the act having jurisdiction as defined by section 6 of the act. Thus, but for the provision of section 5 of he MCOC Act a Special Court as contemplated by section 5 thereof could not have come into existence. The Special Court in Bombay therefore owes its existence to section 5 of the MCOC Act only and it is this Court which I must keep in mind while answering the question as to its having jurisdiction to take cognizance of a private complaint under section 9 of the MCOC Act.

24. Sections 24 and 25 of the Code empower the State to appoint Public Prosecutors and Additional and Assistant Public Prosecutors for conducting of trials in the Court under the Code. A perusal of these provisions would make crystal clear that the State of Maharashtra cannot use the power given to it under sections 24 and 25 to appoint a special Public Prosecutor in the Court of Special Judge appointed under section 5 of the MCOC

Act. The intention of the Legislature in this regard is obvious from the specific provision made in the MCOC Act by section 8 thereof. It empowers the State Government to appoint person to be a Public Prosecutor or an Additional Public Prosecutor for the Special Court. The section also provides for the qualification necessary for such an appointment. Thus, a Special Court other than the Courts contemplated by the Code is created by MCOC Act, a Special Public Prosecutor is required to be appointed under the provisions of the MCOC Act without taking recourse to sections 24 and 25 of the Code for conducting trials under the Act.

25. Then I must notice provisions of section 4 of the Code. It provides by sub-section (1) that all offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained. It then provides by sub-section (2) of section 4 with regard to offences under any other law. It prescribes that all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to same provisions viz. Provisions of Criminal Procedure Code but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise

dealing with such offences. The words "regulating the manner of inquirying into" need special attention. It is therefore ordained by section 4 of the Code that any inquiry into any offence defined under any other law shall normally be in accordance with the provisions of the Code but shall always be subject to any enactment for the time being in force regulating the manner of inquiring to the offences mentioned in that act. From section 4 of the Code it is therefore clear that wherever any special enactment or any special provision is made regulating the manner of inquiry and investigation into the offence it is that special provision that will prevail and not the provisions of the Code. I will note the special provisions made in the MCOC Act. In this relation it will be obvious that the special offences mentioned in this special enactment must be dealt with under that act itself.

26. Then I must notice section 26 of the Code which provides for Courts by which offences are triable. It begins with the words "subject to other provisions of this Code" viz. Criminal Procedure Code any offence under the Indian Penal Code may be tried by the High Court or Sessions Court or any other court by which such offence as shown in the first schedule is triable. Then by sub-section (b) of section 26 it is provided that any

offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court and if no court is so mentioned, may be tried by High Court or any other court by which such offence shown is triable. This provision therefore necessarily means that any offence under the MCOC Act is tribal only by such court as is created by that act. This provision of section 26 is required to be noted because the contention raised is that though its a special court created under the MCOC Act it can take recourse to the provisions of the Code for conducting trial or investigation or inquiry under the act. Any complaint of any offence under the MCOC Act is therefore required to be tried by such court as is established under the MCOC Act. A combined reading of section 26(b) and 4(2) of the Criminal Procedure Code would lead to inevitable conclusion that any offence under the MCOC Act can be tried only by that Court created under that act and the procedure to govern the conduct of inquiry and investigation and trial shall be that prescribed by MCOC Act and not the general provisions of the Code. Section 5 of the MCOC Act specifically empowers the State Government to create by a notification in the official gazette one or more special courts for trial of persons accused to have committed any offence under this act. Procedure of appointment is stated in detail in section

5. It will thus be seen that a special court constituted under section 5 of the MCOC Act is a special court and not a criminal court as defined by Criminal Procedure Code. It is because of this power under section 5 that the category of special courts under section 5 of the MCOC Act has come into existence in the State of Maharashtra and it is the power of this special court which is to be examined to find out whether he can entertain a private complaint and take cognizance thereon of the offences mentioned therein. For doing so, it would be necessary therefore to take into consideration the provisions of special act viz. the MCOC Act. However before I proceed to consider the provisions of MCOC Act in details I also should notice some other provisions of the Criminal Procedure Code for elucidating the answer to the question referred. Section 39 of the Code which makes it a duty of every person to inform commission offence to Magistrate or a police officer. Therefore complaint as defined by section 2(d) of the Code has to be made by a person who acquires any knowledge of commission of any offence to a Magistrate or a police officer. I will advert to this aspect of section 9 of the Code at later stage when I deal with the submissions made at the bar regarding not rendering any person remedy less or expose him to hazards of police atrocities.

27. Section 154 of the Code provides for the manner in which information regarding cognizable offence is to be recorded. Clause (3) thereof takes care of complaint of cognizable offence where the police do not act as contemplated by the section. Then section 156 provides the power to police officer to investigate and empowers the Magistrate under section 190 to order any such investigation under section 156(3). At this juncture I must notice section 3 of the Code which deals with construction of references to certain legislations mentioned in the Code. It provides that in this Code any reference to a Magistrate shall be a reference to a judicial magistrate, any reference to a Metropolitan Magistrate shall be a reference to a Metropolitan Magistrate. Similarly references to the words "Magistrate", "Courts" etc. in the Code appearing in other enactments is also stated and it deals with the Magistrates, Chief Judicial Magistrates, Metropolitan Magistrate or Chief Metropolitan Magistrate. It nowhere provides for construction of a reference to a special court as established under section 5 of the MCOC Act. Consequently the power to direct investigation or inquiry under section 156(3) of the Code can be exercised by a Magistrate as provided by section 190 of the Code. The word Magistrate occurring in section 190

has to be construed by reason of section 3 as reference to Judicial Magistrate in relation to an area etc. to a Metropolitan Magistrate in relation to a metropolitan area. The word Magistrate occurring in the provisions of section 190 cannot therefore have reference to any other Court or authority but to a Magistrate defined and appointed under the Code. It is obvious that a special court appointed under section 5 of the MCOC Act can certainly not be construed or referred to as a Magistrate while considering provisions of section 190 or 156(3) of the Code. It is pertinent to note that section 3 which deals with the construction of references to certain Courts does not even refer to or provide for construction of reference to a Court of Sessions because Criminal Procedure Code envisages committal proceedings to precede the trial of case triable by Court of Session and it is taking into consideration this aspect of criminal trial provided by Criminal Procedure Code that required framing of section 9 of MCOC Act in a particular manner. It specifically says in that section that a special court may take cognizance of any offence without the accused being committed to it for trial. What is provided for by section 9 therefore is a power to the special court created under the act to take cognizance of any offence under the act <u>without requirement of committal of</u>

proceedings. But for this provision and provision of procedural requirement under the special enactment an offender under the act would have been tried under the provisions of the Code first by a Magistrate who under section 190 could take cognizance, order investigation under section 156 and then make an order of discharge or committal as the situation requires. For dealing with special offences created by special enactment this procedure of committal was thought unnecessary, the act having provided special procedure by the phrase "A special court may take cognizance of any offence without the accused being committed to it for trial". I have to consider the question of power of this special court to order investigation under section 156(3) of the act. I will have to examine the provisions of MCOC Act in this perspective.

28. However before proceeding to deal with specific procedural aspects of MCOC Act it is necessary that reference to certain provisions of the Code is complete. Section 173 of the Code requires a police officer to report on completion of investigation or inquiry to a Magistrate empowered under section 190. It is only the Magistrate empowered under section 190 who can order investigation under section 156(3) and it is only to such Magistrate that the police would make a report

under section 173. Reference to word Magistrate has to be to a Magistrate as defined in the Code. There cannot be any reference to a special court for special cognizance except by a procedure as provided by special enactment.

29. Provisions of section 190 empower the Magistrate as defined by the Code to take cognizance of any offence he can take cognizance of even offences which are not triable by him. But he cannot take cognizance of offence under the MCOC Act because MCOC Act empowers only a special court created under section 5 to take cognizance in accordance with provisions of sections 9 and 23 thereof. The special court created under section 5 of the MCOC Act cannot therefore take recourse to provisions of section 190 of the Code as it empowers only a Magistrate as defined in the Code to take cognizance or order investigation or inquiry.

30. Then I must notice provisions of section 193 of the Criminal Procedure Code. It specifically bars any court of Sessions from taking cognizance of any offence as Court of original jurisdiction unless the case is committed to it by a Magistrate. The legislature was aware of this bar under section 193 of the Code and therefore it enacted section 9 in the form that it has

been enacted and provided that special court can take cognizance of offence under the special act without there being any requirement of committal because by reason of section 193 even the Court of Sessions cannot take cognizance of offence unless committed to it by Magistrate under the act. Section 9 does away with requirement of this committal and empowers the special court by providing that it may take cognizance of offence under the special act without it being committed to the special court. The word "may" used in section 9 is therefore an intentional use of a correct word.

31. Then section 200 of the Code speaks of a Magistrate who can take cognizance of a private complaint. It speaks of a Magistrate and not a sessions court or special court created by special enactment. Under section 200 it is only Magistrate to be construed by reference to section 3 of the Code as Magistrate to specified area who can entertain private complaint under section 200. Provisions analogous to such contained in section 200 are absent in the MCOC Act. It will be clear from the provisions of Chapter XV which contains section 200. Section 202 empowers the Magistrate to enquire into the case complained of either by himself or directing investigation to be made by police officer thus invoking the provisions of section 156(3) of the

Code. A direction to police officer under section 156(3) to investigate or inquire can therefore be issued only by a Magistrate as defined in the Code and not by a special court without specifically being empowered to that effect and such empowering is provided by special enactment in clause (4) of section 9 of that enactment. A situation may arise where a Magistrate takes cognizance of certain complaint disclosing offence under the Indian Penal Code triable by the Court of Sessions and the Court of Sessions i.e. the Sessions Judge is also nominated and appointed as Special Court under section 5 of the act. Act also provides that a Special Court appointed under the act shall be competent to try offences under the Indian Penal Code also. It is to meet with such a situation that the word "may" is used in section 9. Section 9 provides that a Special Court may take cognizance of offences under the act or may take cognizance on a matter being committed to it by a Magistrate acting under section 190 of Criminal Procedure Code but he shall always have the power to take cognizance of offences under the MCOC Act when accompanied by sanction under section 23 of the act without there being proceedings for committal.

32. That takes us to the consideration of the provisions prescribing procedure under the MCOC Act.

The Maharashtra Control of Organized Crimes Act, 1990 was enacted to make special provisions for prevention of control of and for coping with criminal activities by organized crime syndicate and or gang and for matters connected therewith or incidental thereto. It is necessary to note the statement of aims and objects for this enactment.

> "Organised crime has for quite some years now come up as a very serious threat to our society. It knows no national boundaries and is fueled by illegal wealth generated by contract killings, extortion, smuggling in contrabands, illegal trade in narcotics, kidnappings for ransom, collection of protection money and money laundering, etc. The illegal wealth and black money generated by the organised crime is very huge and has serious adverse effect on our economy. It is seen that the organised criminal syndicates make a common cause with terrorist gangs and foster narco terrorism which extend beyond the national boundaries. There is reason to believe that organised criminal gangs are operating in the State and thus, there is immediate need to curb their activities.

It is also noticed that the organised criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

2.The existing legal frame work i.e. the penal and procedural laws and the adjudicatory system are found to be rather inadequate to curb or control the menace of organised crime. Government has, therefore, decided to enact a special law with stringent and deterrent provisions including in certain circumstances power to intercept wire, electronic or oral communication to control the menace of the organised crime".

It will be seen that the existing penal procedural laws of adjudicating system was considered to be inadequate for controlling the menace of organized crime and therefore this special law was enacted with stringent and deterrent provisions for controlling the menace of organized crime. It then proceeded to prescribe the

procedure for implementation of the provisions of the act and conduct of trial under the act. It would therefore be obviously improper and impermissible to take recourse to the procedural law which the State while enacting MCOC Act itself found to be inadequate for empowering the court created under that act. It also provides for specific procedure for implementation of that act. It must be borne in mind that the procedure viz. Criminal Procedure Code was considered inadequate by the State for controlling the menace of organized crime. I must therefore be conscious of this fact while considering the question whether special court created under the act can take recourse to such provisions under section 156 or 202 of the Criminal Procedure Code.

33. Section 1 of the act makes it applicable throughout the State of Maharashtra. It came into force on 24.2.1999. Section 2 deals with definitions. Section 3 deals with forfeiture of properties and punishment for certain offences created by the act, so is section 4.

34. Then comes section 5 which empowers Government of Maharashtra to constitute by a notification in the Official Gazette one or more special courts for dealing

with cases arising out the provisions of the act. The section elaborately provides the manner in which the court is to be established. It provides for concurrence of the Chief Justice of Bombay High Court, for appointment of a presiding officer on the special court. It lays down the classification, it states the duties of special court and then by section 6 thereof provides jurisdiction of the court in which it is said that notwithstanding anything contained in the Code every offence punishable under this act viz. MCOC Act, shall be triable only by the special court within whose local jurisdiction it was committed. It therefore effectively bars a court of sessions established under the Code of Criminal Procedure from trying any offence under the act unless Court of sessions or the presiding officer thereof is specifically nominated under section 5 by a notification published in the official gazette by the State Government. By necessary implication a special court created under section 5 has jurisdiction only under section 6 to do what section says. The special court having this special jurisdiction therefore cannot take recourse to the provisions of Code for the purposes of ordering investigation as such procedure was considered inadequate by the framers of this act. Section 7 then empowers special court to try other offences also so that there is no unnecessary

protraction of trial.

35. Section 8 then provides for appointment of Public Prosecutors. Procedure also is prescribed. It is consequently obvious that unless a public prosecutor is duly appointed in accordance with the provisions of section 8, the public prosecutor appointed under sections 24 or 25 of the act cannot act as public prosecutor of the special court established under section 5 of the act having jurisdiction under sections 6 and 7 of the act.

36. Then comes the crucial section, section 9. It prescribes the procedure and powers of special court. Sub-section 1 thereof provides that special court may take cognizance of any offence without the accused being committed to it for trial upon receiving complaint of facts which constitute such offence or upon a police report of such facts. It will be seen that section 9 not only empowers the special court to take cognizance of any offence under the act but also empowers it to take cognizance of any offence even those not mentioned in this act. This can be done by special court without waiting for committing proceedings to take place in relation to offence not covered by the act. It is therefore provided that the special court may take

cognizance of any offence whether under the act or under the Penal Code. Therefore it provides that he may do so upon receiving a complaint or police report. The questions which requires our opinion is what he should do on receiving such a complaint which obviously is as defined under section 2(d) of the Code and does not include a complaint made to the police, which is taken care of by the police report. In our opinion, it is in the light of this discussions that a special court established under section 5 of the MCOC Act having jurisdiction under sections 6 and 7 of that act can receive a complaint as defined by section 2(d) of the Code. In fact the real question is what he can do after receipt of such complaint. Whether he can direct investigation under section 156(3) of the Code as is done by the impugned order or transmit the complaint for being dealt with in accordance with provisions of MCOC Act. I will get the answer to this by referring further provisions of the act.

37. Sub-sections 2 and 3 of section 9 of the MCOC Act provide for the manner in which the trial will be conducted and then sub-section 4 empowers the special court with all the powers of the court of sessions to try such offence as if it were a court of sessions and for so doing it may exercise all powers of court of

sessions. The entire code of Criminal Procedure nowhere empowers the court of sessions to order investigation under section 156(3). Such an order can be made only by a Magistrate contemplated by section 190. A special court or court of sessions obviously is not a Magistrate as contemplated by section 190 of the code. In our opinion, therefore a special court established under section 5 of the MCOC Act having jurisdiction under sections 6 and 7 of that has no power to order investigation into a complaint of any offence whether under the MCOC Act or the Indian Penal Code. A cohesive reading of section 9 and its sub sections 1 to 4 would thus establish that special court will function within the limits prescribed by section 9 and have the powers given to it by section 9. Section 10 gives precedence to the trials by special courts.

38. Then I must notice the provisions of section 11. It gives power to the special court to transfer cases to regular courts. It reads thus:

> "11. **Power to transfer cases to regular Courts**.---- Where, after taking cognizance of an offence, a Special Court is of the opinion that the offence is not triable by it, it shall, notwithstanding that it has no jurisdiction to

> try such offence, transfer the case for trial of such offence to any Court having jurisdiction under the Code and the Court to which the case is transferred may proceed with the trial of the offence as if it had taken cognizance of the offence."

Section 11 quoted above thus empowers a special court to transfer the case not triable by it to a Court of proper jurisdiction. It will be seen that section 7 empowers the Court to try other offences also. Section 5 provides that special Court shall be presided over only by Sessions Judge or Additional Sessions Judge. By necessary implication the offence, trial of which could be taken up by special court even though they are not offences punishable under the act would be trials of offence triable exclusively by court of sessions as prescribed under the schedule to the Code. Consequently where after taking cognizance of an offence as provided for by section 23 of the MCOC Act it comes to the knowledge of the special court that an offence appears to have been committed but it cannot try it as it is not triable either by court of sessions or by special court it shall have the power to transfer to appropriate court viz. the Magistrate and in such eventuality cognizance shall be deemed to have been taken as provided by

section 11. A Magistrate can take cognizance within the four corners of section 190 of the Code beyond that he cannot do anything further. Section 11 therefore provides that in such case the cognizance will be deemed to have been taken. It thus takes care of a private complaint made to a special court of which the special court takes cognizance via section 23 and provides that in such eventuality the offence triable by the Magistrate shall be deemed to have been taken cognizance of and special court shall have the power to transfer it to the appropriate Magistrate. It cannot therefore be said that a person filing a complaint under section 9 is remedy less or the special court is power less to deal with it. How it should do it is provided by further sections.

39. In this case I am not concerned with sub-sections 12, 13, 14, 15 and 16 having been struck down by this Court. Section 17 creates a certain presumption. Section 18 makes certain confessions specified in it admissible in evidence. Section 19 provides for protection of eye-witnesses. This provision requires notice. Why was it necessary for the Legislature of Maharashtra to specifically provide protection to witness. In my opinion, it was so thought necessary, taking into consideration the seriousness of the

offences or the organized crime syndicate, the power which it yields and the serious threat it can pose to witnesses and the power to come before the Court and do their duties under section 39 of the Code and depose before the Court their knowledge about the incident. The State legislature was aware of vast power of the organized crime syndicate therefore it provided specifically for a protection of witness.

40. By section 20 it provided for forfeiture and attachment of property connected with offence or offender. This provision also requires notice. In earlier point of time the Indian Penal Code did have provisions which permitted attachment or forfeiture of properties connected to a crime. But as the welfare activities in the State grew rights of persons connected by blood to a criminal, but not involving in the criminality as that criminal, were regarded as separate section of the society which could not be penalized for no fault of their's. Though these provisions are deleted from the Code or Indian Penal Code they were reenacted by section 20 as stringent measures were necessary to prevent organized crime. It is this stringent and strict nature of the enactment which must be kept in mind while interpreting the provisions of this act particularly while considering necessity of

cognizance as contemplated by section 23 of the act.

41. Section 21 then provides for modification of certain provisions of the Criminal Procedure Code. This obviously points out that the provisions of Criminal Procedure Code are not mutatis mutandis applicable to offences or trials or investigations under the act and wherever necessary specific provisions have been made applicable or barred or modified. Section 22 then provides for certain other things. It will be seen from the aforesaid provisions in fact from the entire enactment that its object is to prevent or control organized crime. For doing so, stringent overriding powers are given to the Courts appointed under the Act. The possibility of such stringent provisions harming innocent citizens cannot be overlooked and has not been overlooked by Maharashtra Legislature. It therefore specifically framed section 23 of the act which reads as under :

> **"23.Cognisance of, and investigation into, an offence**.----- (1) Notwithstanding anything contained in the Code, ------
>
> (a) no information about the commission of an offence or organized crime under this Act, shall

be recorded by a police officer without the prior approval of the police officer not below the rank of the Deputy Inspector General of Police;

(b) no investigation of an offence under the provisions of this Act shall be carried out by a police officer below the rank of the Deputy Superintendent of Police.

(2) No Special Court shall take cognizance of any offence under this Act without the previous sanction of the police officer not below the rank of Additional Director General of Police".

It provides for the manner in which cognizance of offence or investigation into offence is to be done. The Legislature has noticed and has taken serious note of the fact of possible misuse of the provisions of this act, which are very stringent in nature, has to be strictly avoided. Therefore there has to be, of necessity, strict interpretation of the provisions of this act. That they are penal needs no saying, that they are stringent is obvious and therefore they required strict interpretation and implementation is also obvious. I must keep this in mind when I proceed to analyze further provisions of section 23. It begins

by saying notwithstanding anything contained in the Code and then says no information about the commission of an offence of organise crime under this act shall be recorded by the police officer **without prior approval of the officer not below the rank of Deputy Inspector General of Police**. It prohibits even recording of information pertaining to commission of crime as defined by the act by the Police Officer. It bans any investigation into such offence under the act except by a police officer of the rank of Deputy Superintendent of Police and above. If the police whose ordinary duty is to take information, recording commission of offence as contemplated by section 154 and investigate it under section 156 of the act cannot do something as required of them under the Code how can a Special Court not covered by the provisions of the Code take notice of the complaint and order investigation. It will not be possible to hold in the circumstances that a Special Court can direct investigation under section 156(3) of the Code because that cannot be directed even by Superintendent of Police. I also cannot equate a Special Court which is presided over by a Sessions Judge to a Deputy Inspector General of Police. I also cannot imagine a Special Court to be a police officer of the rank of Deputy Superintendent of Police who can take note of the information of commission of offence under

the MCOC Act and order investigation after approval is received. It is then provided by subsection 2 that no Special Court shall take cognizance of offence under this act without previous sanction of the police officer not below the rank of Additional Director General of Police. Information may be received, recorded or investigation may be conducted by Deputy Superintendent of Police with previous approval of Deputy Inspector General of Police but sanction to take cognizance can be given only by Additional Director General of Police the second highest police officer in the State of Maharashtra. If a Special Court cannot take cognizance of offence without previous sanction of the Additional Director General of Police how can it act and record information of commission of such crime and direct investigation which is the power given to an officer subordinate to the Additional Director General of Police.

42. In my opinion the word "may" used in section (1) is used deliberately. For a cohesive reading of section and proper interpretation thereof "may" will have to be read as "may". Section 9(1) is legislated to overcome ban under section 193 of the Criminal Procedure Code which says no Court can take cognizance except under section 190. To do away with the necessity committal

proceedings for the special kind of offences mentioned in the act it is provided that the special court may take cognizance of any offence when taking committal of it for trial. It is a permissive provision which but for its existence could have prevented a special court from taking cognizance of any offence defined under the act. This can be considered from a different angle also. Section 25 of the MCOC Act provides that the provisions of the act and the rules will have overriding effect for any other law for the time being in force if it is viz. any other law inconsistent with the provisions of this Act. Therefore notwithstanding anything contained in section 193 of the Criminal Procedure Code a special Court can take cognizance of an offence under the act in a manner provided by the act. There is yet another angle which supports my interpretation that the word "may" occurring in sub-section (1) of section 9 must be read as "may". A Special Court under section 9 may take cognizance of an offence on a private complaint or on police report postulates existence of sanction under section 23(2). If there is no sanction under section 23(2) of the MCOC Act the Court acting under section 9 cannot take cognizance. Therefore where there is sanction it may take cognizance where there is a complaint the Court may take cognizance even without committal proceedings The

use of the word "may" is as observed above to avoid bar to section 193 of Criminal Procedure Code and to prevent a Magistrate from taking cognizance in cases where there is no sanction under section 23(2) of the MCOC Act.

43. As I have already noticed the provisions of MCOC Act were considered by the Division Bench of this Court in the case of **Saquib Abdul Hamid Nachan V. State of Maharashtra & Ors.**, (Criminal Appeal No.1451 of 2004) as the same were similar to the provisions of Prevention of Terrorism Act, 2002 which that bench was considering. In para 12 it noticed the provisions of sections 9 and 23 while dealing with the Judgment of the learned Single Judge of this Court reported in **2004 ALL.MR (Cri) 1689** wherein the learned Single Judge had taken a view that though cognizance under section 23 of the MCOC Act cannot be taken without previous sanction the Special Court has power to make precognisance investigation and therefore can issue an order of investigation under section 156(3). The Division Bench of this Court while dealing with correctness of that judgment observed that the judgment does not lay down correct law and has given its reasons for so holding. I am in respectful agreement with the observations made by the Division Bench. They read as under:

"The reasoning as is evident on reading paragraph 17 of the judgment which is quoted above, suffers from drawback and puts the State and Central Governments in embarrassing position. The Single Judge has lost the sight of the fact that the order dismissing the complaint is not a final order under the law and it can be very well challenged before this court and the Apex Court by filling appropriate proceedings. If the superior courts come to the conclusion that the order of dismissal of such complaint by the special court was erroneous one, then there is a finding of the Superior Court or record that there is a case for taking cognizance. In such a situation, at the most the superior court in view of Section 50, may direct the complainant to approach the State Government or the Central Government for getting a sanction to prosecute, so that the Special Court can exercise a power of taking cognizance under section 29. However, at that stage, in view of the directions of the Superior Courts if the Complainant approaching the State or Central Government, the State Government or Central Government cannot ignore the finding of the superior court's and they are called upon to take decision whether to grant

sanction or not to grant. In the backdrop of the finding recorded by the Superior Court that there is a case for taking cognizance and thereby not only the Central Government and State Government are placed in an embarrassing position but the exercise of powers under section 50 of the appropriate State Government becomes an empty formality. The matter becomes a fait accompali for both the governments. Same result equally follows in case Special Court comes to the conclusion that there is a case for taking cognizance but is cannot be taken because here is no sanction under section 50 and issue direction to complainant to approach the appropriate Government to get sanction under section 50 of the POTA Act. Therefore, the appropriate way for filling such prosecution is to approach to the appropriate Government for getting a sanction and if the sanction is granted, thereafter to file the complaint under section 29 of which Special Court can take cognizance. Any other procedure, as submitted by the learned counsel and revealed from the reasoning as given by the Single Judge above, is not conducive to the judicial propriety and especially to the right of the appropriate government to consider the case for grant of

> sanction or not to grant it. The scheme of the Act does not permit any other procedure except the procedure as we envisage from the provisions of the Act."

From the above quotation which I respectfully approve it is obvious that the scheme of the act does not permit any other procedure except that prescribed by the Act. Our analysis of the provisions made herein before is in consonance with the observation made by the Division Bench. I am therefore supported by the view taken by the Division Bench which I respectfully approve.

44. Similar question of taking cognisance by Special Court was considered by the Supreme Court of India in the case of **Gangula Ashok & Anr. v. State of A.P., (2000) 2 SCC 504**. The Supreme Court there was considering the provisions of Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989, section 14 of which provides for Special Court taking cognizance and the Supreme Court found on consideration of the entire provisions that a Special Court under that Act cannot take cognizance directly as Court of origin jurisdiction without a case being committed to it by a Magistrate in view of section 193. Thus it will be seen

from the ratio of the above case that section 193 of the Criminal Procedure Code is complete bar to taking cognizance by any Court of origin jurisdiction without it being committed to it by a Magistrate. Thus, my view that cognizance cannot be taken without the previous sanction would be fortified in view of the ratio of this case. This judgment also fortifies my view with regard to meaning of the words "may take cognizance without being committed to it" in section 9 of the MCOC Act. It is therefore that the word "may" has to be read as "may". In this very case the Supreme Court has observed in para 16 as under :

> "16. Hence we have no doubt that a Special Court under this Act is essentially a Court of Session and it can take cognizance of the offence when the case is committed to it by the Magistrate in accordance with the provisions of the Code. In other words , a complaint or a charge-sheet cannot straight away be laid down before the Special Court under the Act."

45. From the above it is clear that the bar contained in section 193 of Criminal Procedure Code is complete. No Special Court or Court of original jurisdiction can directly take cognizance of any matter without it being

committed to that Court. Consequently, it was essential that the special legislation viz. MCOC Act contains provision to over ride this bar under section 193 of Cri. P.C. and it is for this reason that section 9 of the MCOC Act is so worded to provide or empower the Special Court under that Act to take cognizance of any offence under the Act without there being committal proceedings. It does not do away with the requirement of sanction prior to cognizance as contemplated by section 23.

46. Several judgments of the Supreme Court of India and other High Courts were cited before us in support of the contention that no cognizance can be taken by Special Court without prior sanction of the authority mentioned in the statute. These judgments considered various statutes where such requirement as Special Courts is mentioned. I need not deal with each of the case cited as all the decisions are similar in their ratio which says that such cognizance without prior sanction cannot be taken. There is yet another and substantial reason for not considering in detail the various judgments cited at the Bar. Very recently the Supreme Court of India had occasion to consider similar provisions under Terrorist and Disruptive Activities (Prevention) Act, 1987 in the case of **Mukhtiar Ahmed**

Ansari v. State (NCT of Delhi), 2005 SCC (Cri.) 1037. Section 20A of TADA reads as under :

> "20A. **Cognizance of offence**" (1) Notwithstanding anything contained in the Code, no information about the commission of an offence under this Act shall be recorded by the police without the prior approval of the District Superintendent of Police.
>
> (2) No court shall take cognizance of any offence under this Act without the previous sanction of the Inspector-General of Police, or as the case may be, the Commissioner of Police."

These provisions are almost identical to the provisions of section 23 of the MCOC Act which read as under :

> **"23.Cognisance of, and investigation into, an offence**.----- (1) Notwithstanding anything contained in the Code, ------
>
> (a) no information about the commission of an offence or organized crime under this Act, shall be recorded by a police officer without the prior

approval of the police officer not below the rank of the Deputy Inspector General of Police;

(b) no investigation of an offence under the provisions of this Act shall be carried out by a police officer below the rank of the Deputy Superintendent of Police.

(2) No Special Court shall take cognizance of any offence under this Act without the previous sanction of the police officer not below the rank of Additional Director General of Police."

It will be seen that the only difference between the two sections is that under TADA no information about commission of offence under that act can be recorded without prior approval of the District Superintendent of Police, whereas under MCOC Act it is prior approval of the Deputy Inspector General of Police which is required. In the above referred judgment the Supreme Court of India has exhaustively considered the several judgments of the Supreme Court given prior to that judgment and after extensively analysing the provisions has come to the conclusion that prior approval under section 20A is a condition precedent for registering a case under TADA for recording information about

commission of offence under that Act. I have noticed above the similarity in section 20A of TADA Act and 23 of MCOC Act. The ratio of the Supreme Court judgment in Mukhtiar Ahmed Ansari's case above must therefore apply mutatis mutandi to section 23 of the MCOC Act. It will not be permissible for the High Court to take any other view on the provisions of section 23 in view of the interpretation by the Supreme Court of India on the provisions of section 20A of TADA Act. I have already pointed out in details how in our opinion, also sections 9 and 23 of the MCOC Act are required to be interpreted in the manner indicated above. In my humble opinion, my view in this regard as exhaustively discussed above, is fortified by the ratio of Mukhtiar's case. It is because of this judgment and Article 141 that I do not feel it necessary to consider in detail several other judgments cited at the Bar and which were considered by the Supreme Court of India in the above referred judgment.

47. Yet another important aspect which must be kept in mind while interpreting the provisions of the MCOC Act is the nature of crimes defined by it, punishments prescribed by it and the gravity of the offences to cover which this enactment was legislated. I must always keep in mind that this Act was legislated to make

special provisions for prevention and control of and for coping with criminal activities by organized crime syndicate or gang. The offences defined by the Act are serious and grave. The penalties are severe. It confers several powers on the police. It makes confessions made in certain situations admissible when entire general law on the point makes such confessions inadmissible. The totality of the fact of the powers conferred by this Act on the police is enormous and, therefore, it has provided for safeguards against misuse of this power by the police. Those safeguards are contained in Section 23 of the MCOC Act, which prohibits even recording of an information regarding an offence under the Act without the previous approval of the Deputy Inspector General of Police and this is so notwithstanding anything contained in the Code. To hold that in spite of this embargo the police can investigate or record information or make inquiry under Section 156(3) of the Code is to commit complete violence with the language of Section 23 of the MCOC Act, which is impermissible in law.

48. There is another aspect to this. But for such provision as contained in Section 23(1) (a) and (b) of the MCOC Act, recourse could have been taken to Section 156 of the Code and a Station House Officer, who usually

is a Police Officer, could have recorded the information or organized crime, proceeded to make inquiry, file challans in the Court of a Magistrate and the Magistrate can take cognizance of the offence. Section 9 of the MCOC Act does not contemplate taking of cognizance by a Magistrate. These safeguards are provided by Section 23 of MCOC Act to prevent misuse of these powers under the MCOC Act by police officers generally. Even recording of information, therefore, is made subject to prior approval of a police officer not below the rank of Deputy Inspector General of Police. Permitting a Special Court to order on a private complaint inquiry or investigation under Section 156(3) of the Code is to do away with this precaution taken by the legislature as a protection from unwarranted use of the provisions of the MCOC Act. Therefore, it is not permissible to hold that a Special Court under the MCOC Act can direct investigation or inquiry under Section 156(3) of the Code.

49. Similarly, no investigation or inquiry of an offence under the MCOC Act shall be carried by a police officer below the rank of a Deputy Inspector General of Police. Section 156 of the Code contemplates inquiry and investigation by a Station House Officer, who is always below the rank of a Deputy Inspector General of

Police. Even though it is open to a Station House Officer, who is a Police Inspector, to transit such investigation to a Deputy Superintendent of Police, it is open for him to do it by himself, in which case it will be a clear breach of Section 23(1) (b) of the MCOC Act. When there is a statutory prohibition notwithstanding anything contained in the Code to record information or to investigate, to permit such recording or investigation by use of Section 156(3) of the Code would be illegal and, therefore, impermissible. Such interpretation would be causing great violence to the language and intention of the legislation. It will take away the protection granted by the Act to people from possible misuse of the provisions of the Act. I have already observed above the disastrous results that will take place by holding that on a private complaint, a Special Court under the MCOC Act can direct investigation by police under section 156(3) of the Code and looking to the seriousness of the issues involved, I would like to repeat what I have already said. If it is held permissible for a Special Court to direct investigation under section 156(3) of the Code on a private complaint, what will happen is that any person can file a private complaint before the Special Court under the MCOC Act. The said Court, though it is not a Magistrate as defined in the Code and contemplated by

Section 156(3) of the C ode directs investigation or inquiry under Section 156(3) and on receipt of the same takes cognizance of it without there being a sanction. It nullifies the entire provision of Section 23 of the MCOC Act. Apart from that, it destroys the protection given to citizens from possible misuse of the MCOC Act.

50. Taking into consideration all these aspects I am of the opinion that the question referred to us will have to be answered in negative that is to say:

> "**Q. Whether in a private complaint filed under the provisions of Section 9(1) of the Maharashtra Control of Organized Crime Act, 1999 designated Court is empowered to order investigation under section 156(3) of the Code of Criminal Procedure before approval/sanction is granted to investigate and take cognizance as contemplated under section 23 of the said Act?**
>
> **A. A designated Court under the MCOC Act does not have the power to direct investigation under section 156(3) of the Criminal Procedure Code in view of the provisions of sections 9 and 23 of the MCOC Act."**

This answer by me to this question referred to above therefore necessarily creates another question as to what would happen when a complaint of offence as prescribed under the act is made in writing or orally to the designated court directly. This aspect was emphasized by several learned advocates appearing before us. The fear was expressed that in such a situation the private complainant would be remedy-less and will have to tolerate atrocities of the authorities concerned under the act without a Forum where he can complain about it. In my opinion, all such fears are baseless. I have already pointed out above that a complaint can be made to a designated Court of any offence as defined in that act being committed by any person. In the event of such complaint being made to a designated court all that is required of the learned Judge to do is to transmit that complaint to the Deputy Inspector General of Police of the area concerned for being dealt with in accordance with law. On such receipt of the complaint the Deputy Inspector General of Police would issue his necessary prior approval to the concerned police officer for recording information about the commission of offence of the crime under the act. That police officer if he himself is of the rank of Deputy Superintendence of Police or above him carry out investigation himself, or may direct another officer not below the rank of Deputy

Superintendent of Police to carry out investigation. On completion of investigation the police officer who is designated officer will file the report before the Additional Director General of Police who thereafter would consider the report and may grant sanction under section 23(2) to take cognizance which then would be transmitted to the special court designated under the act and whereupon the Court shall take cognizance of the complaint of fact as originated by the complaint initially filed before it.

51. It will be seen that section 9(1) itself stipulates that cognizance can be taken in two situations; (i) upon receiving a complaint of facts which constitutes such offence and (ii) upon a police report of such facts. A cohesive reading of the provisions of sections 9 and 23 would result in transmission of the complaint so received to the designated police officer who will then with approval conduct investigation and not only go to the Additional Director General of Police for consideration of grant of sanction but on receipt of such sanction, if granted, matter would come back to the Special Court. When the police report of such facts is filed it will have to be accompanied by appropriate order of sanction before the special court can take cognizance of such offence. It

cannot therefore be said that an individual who wants to make a complaint of an offence under the act is remedy-less. I will again revert to the provisions of section 39 of the Criminal Procedure Code which makes it a duty of ever person aware of commission of offence to report the matter to the police. It is therefore possible that the person who acquires such knowledge goes to the police but his complaint is turned down. In such an eventuality, which may be rare, it is open for the complainant to then file criminal complaint before the designated court upon receipt of such complaint the designated court or special court will follow the procedure which I have indicated above. Consequently it cannot be said that any person aggrieved of any offence being committed under the act being remedy-less. Adequate remedies exit in the Act as it stands.

52. To sum up I restate my conclusions:

(i) a complaint as contemplated by section 2(d) of Cri.P.C. that can be filed by any individual before special court designated under the act;

(ii) on receipt of such complaint the learned special court would transmit the same to the Deputy Inspector General of Police of the range

from which the complaint emanates for appropriate action under section 23(1);

(iii) The Deputy Inspector General of Police to whom such complaint is forwarded will then apply his mind and grant approval to appropriate officer mentioned in section 23(1)(a) to record information about commission of offence as it emanates from the complaint and then order investigation by an officer not below the rank of Deputy Superintendent of Police as contemplated by section 23(1)(b);

(iv) on completion of investigation the report shall be placed before the Additional Director General of Police for consideration of the question regarding grant of sanction to take cognizance, who on application of his mind to the report and the facts as disclosed thereby will grant or refuse as the case may be previous sanction to take cognizance of the matter under section 9(1) of the act;

(v) it is on receipt of such police report accompanied by sanction under section 23(2) that the Court will take cognizance under section

9(1). From the above it will be seen that that being the procedure prescribed under the Act section 9(1) says that a special court may take cognizance. To illustrate a special court cannot take cognizance if the report placed before it is not accompanied by a sanction .

53. I would therefore allow the writ petition No.127 of 2005 and set aside the order impugned therein. I would also allow Writ Petition No.1449 of 2005 and set aside the order impugned therein. In so far as other writ petitions are concerned mentioned in the cause title, having regard to the fact that my view is minority opinion, I would direct those petitions to be placed before appropriate bench for adjudication of the same in the light of the observations made in majority view.

sd/-

(V.G.PALSHIKAR, ACG.C.J.)

ORAL JUDGMENT : (Per D.B.Bhosale,J. for himself and for V.K.Tahilramani,J.)

54. We have had the benefit of reading the Judgment proposed by V.G.Palshikar,Acg.C.J. With due respect, we cannot persuade ourselves to agree with the opinion expressed and the reasons recorded in support thereof in the said judgment, hence this separate opinion. The judgment of V.G.Palshikar,Acg.C.J.has elaborately dealt with the facts, arguments advanced by the learned counsel and relevant provisions of law. Hence, we consider it unnecessary to reproduce the facts including the arguments advanced on behalf of the parties except to make a reference to the same to the extent necessary in the course of this Judgment.

55 The conflict in the views on the question, referred to for adjudication by the larger bench, was between the Division Bench consisting of Smt.Ranjana Desai and A.S.Oka, JJ., which pronounced the judgment on 22.12.2004 in Criminal Writ Petition No.1772 of 2004, and the judgment pronounced on 21.12.2004 in Criminal Appeal No.1451 of 2003 by the Division Bench consisting of S.B.Mhase and A.V.Mohta,JJ. Both the Division Benches, while pronouncing the law on the question, made reference to the judgment of the learned Single Judge

(B.H.Marlapalle,J.) in **Dayanand B.Nayak Vs. Ketan K.Tirodkar and Anr, 2004 All.M.R.(Cri) 1689**. The Division Bench in Criminal Writ Petition No.1772 of 2004 finally concurred with the view of the learned Single Judge in Dayanand B.Nayak's case whereas the Division Bench in Criminal Appeal No.1451 of 2003 differed and took the exact contrary view.

56. The Division Bench in Criminal Writ Petition No.1772 of 2004 while upholding the ratio laid down in **Dayanand B.Nayak's** case, in paragraph 39 of the judgment recorded the following conclusions:

(a) The Special Court under the MCOCA is a court of original criminal jurisdiction.

(b) A sanction under section 23(2) of the MCOCA is a sine-quo-non for taking cognizance of a private complaint.

(c) The Special Court cannot take steps under Chapter XV of the Code unless the sanction is obtained. However, prior to the sanction, it can take resort to section 156(3) of the Code.

(d) As per section 9(4) of the MCOCA, for the purpose

of trial, the Special Court will have all the powers of a Court of Sessions as far as may be, in accordance with the procedure prescribed in the Code for the trial before a Court of Sessions.

57. The Division Bench in Criminal Appeal No. 1451 of 2003 after expressing their disagreement with the ratio laid down in **Dayanand B.Nayak’**s case observed that the Special Court cannot take cognizance of a complaint unless there is a sanction under section 50 of the Prevention of Terrorism Act,2002 (for short, "POTA"). The only option open to the Special Court is to direct the complainant to approach the appropriate government to get the sanction under section 50 of POTA, and if the sanction is granted, may proceed to file complaint under section 29 of POTA of which the Special Court can take cognizance. It was further observed that "any other procedure, as observed or revealed from the reasoning given by the learned Single Judge in Dayanand B.Nayak’s case, would not be conducive to the judicial propriety and especially to the right of the appropriate government to consider the case for grant of sanction or not to grant it". The differentiation in the cases which were for consideration before the Division Benches may be noticed. The Division Bench in Criminal Writ Petition No.1772 of 2004 was directly dealing with the

provisions of MCOCA whereas the Division Bench in Criminal Appeal No.1451 of 2003 was dealing with the provisions of the POTA. Against this backdrop, the aforesaid question has been referred to the larger Bench by the learned Single Judge vide order dated 23.3.2005.

58. The core question, referred to for our consideration, is of great importance. We, therefore, heard the learned counsel for the parties in all the petitions/applications at great length. Some other important questions were also posed during the discussions. We propose to make reference to all such questions and deal with them in the course of this Judgment at appropriate places.

59. Before we proceed further, let us make a reference to the Judgment of the Supreme Court in **Reserve Bank of India Vs. Peerless General Finance and Investment Co.Ltd (1987) 1 Supreme Court Cases 424**. In that judgment, while interpreting the provisions of the statutes which were under consideration of the Supreme Court, it was observed that "Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say that if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That

interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place". It is, thus, clear that basic principle of interpretation is that a statutory provision should be construed 'according to the intent of the legislature and normally, such intent is gathered from the language of the provision as observed by the Supreme Court in **Chief Justice of A.P. Vs.L.V.A. Dixitulu (1979) 2 SCC 34**. Keeping these rules of interpretation in view, we would like to deal with the question of law referred to for our

consideration.

60. It would also be advantageous to glance through the Statement of Object and Reasons (for short,"SOR") which is supposed to be a key to unlock the mind of legislature in relation to substantive provisions of statutes. The SOR to MCOCA and other enactments, such as POTA and the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, "NDPS") having stringent provisions, are not similar. The backdrop in which the MCOCA was introduced will have to be borne in mind. The MCOCA was enacted and brought into force on 24.4.1999. The SOR of MCOCA record that "the organised crime has for quite some years now come up as a very serious threat to our society. It knows no national boundaries and is fueled by illegal wealth generated by contract killings, extortion, smuggling in contrabands, illegal trade in narcotics, kidnappings for ransom, collection of protection money and money laundering, etc". It further records that "the illegal wealth and black money generated by the organised crime is very huge and has serious adverse effect on our economy. It is seen that the organised criminal syndicates make a common cause with terrorist gangs and foster narco terrorism, which extend beyond the national boundaries. There is reason to believe that organised criminal gangs

are operating in the State and thus, there is immediate need to curb their activities". It was also noticed that the organised criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice. It further proceeds to note that the existing legal frame work, i.e. the penal and procedural laws and the adjudicatory system are found to be rather inadequate to curb or control the menace of organised crime. The Government, therefore, decided to enact a special law with stringent and deterrent provisions including in certain circumstances power to intercept wire, electronic or oral communication to control the menace of the organised crime. Keeping this in view we now proceed to address the question referred to and the questions incidental thereto.

61. At the outset, we would like to consider a question, raised by Mr Amit Desai, learned counsel for the petitioner in Criminal Writ Petition No.1449 of 2005, whether or not a private complaint under section 9(1) of MCOCA is tenable. Section 9(1) empowers a Special Court to take cognizance of any offence without

the accused being committed to it for trial either upon receiving a "complaint" of facts which constitute such offence or upon a "police report" of such facts. The word "complaint" and the expression "police report" occurring in this section have not been defined in MCOCA. Sub-section (2) of Section 2 provides that "words and expressions" used but not defined in MCOCA and defined in the Code shall have the meanings respectively assigned to them in the Code of Criminal Procedure, 1973 (for short, "the Code"). The Code defines the word "complaint" and the expression "police report" in clauses (d) and (r) in section 2 thereof. "Complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown, has committed an offence, but does not include a police report. It may be noticed that no form is prescribed which the complaint must take. It may only be said that there must be allegations which prima facie disclose the commission of an offence with the necessary facts for the Magistrate to take action. The definition of "complaint" specifically excludes a "police report". "Police report" as defined in clause (r) of Section 2 of the Code means a report forwarded by a police officer to a Magistrate under sub-section (2) of Section 173 of the Code. Section 173 of the Code

provides for a report of police officer on completion of investigation under Chapter XII. Sub-section (2)(i) of section 173 provides that the officer-in-charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a "police report" as soon as the investigation is completed in the form prescribed by the State Government, containing all the particulars mentioned in clauses (a) to (g) thereof. Clause (b) speaks about the nature of "information". The word "information" used in clause (b) means "First Information Report" which would be a part of "police report".

62. In **A.R.Antulay Vs. Ramdas Sriniwas Nayak and Anr, 1984 (2) SCC 500** the Supreme Court while dealing with the provisions of the Prevention of Corruption Act, observed that it is a well recognised principle of criminal jurisprudence that anyone can set and put the criminal law into motion except where the statute indicating or creating an offence indicates to the contrary. It was further observed that the scheme of the Code envisages two parallel and independent agencies for taking criminal offences to Court. Even for a serious offence of murder a private complaint can, not only be filed but, be entertained and proceeded with according to law. Keeping this enunciation in view and

the definition of "complaint" in section 2(d) and the language employed in sub-section (1) of Section 9, we have no hesitation in holding that the word "complaint" occurring in sub-section (1) of Section 9 means a private complaint. Moreover, there is no contra indication in MCOCA preventing an individual from filing a complaint. The further question raised in these petitions, therefore, is what course the special Court should adopt if it receives a private complaint. In other words, whether it is open for the special Court to direct investigation under section 156 (3) by overlooking the provisions of clause (a) and (b) of sub-section (1) of Section 23 of MCOCA and that the previous sanction under section 23(2) is sine-qua-non for taking cognizance of such complaint.

63. To address the core question a scrutiny of all the relevant provisions of the Code would be necessary for better appreciation of the submissions of the learned counsel for the parties.

64. Section 2(d) and 2(r) of the Code, as aforestated, define "complaint" and "police report". Section 2 (c) defines "cognizable offence" which means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the

First Schedule or under any other law for the time being in force, arrest without warrant. Section 6 in Chapter II of the Code, which deals with constitution of Criminal Courts, provides for classes of Criminal Courts and stipulates that besides the High Courts and the Courts constituted under any law, other than this Code, there shall be, in every State, the following classes of Criminal Courts:- (i) Courts of Session; (ii) Judicial Magistrates of the first class and, in any metropolitan area, Metropolitan Magistrates; (iii) Judicial Magistrates of the second class and (iv) Executive Magistrates. Section 26 in Chapter III, which deals with the powers of Courts, provides for Courts by which offences are triable. Clause (b) of Section 26 provides that any offence under any law shall, when any Court is mentioned in this behalf in such law, be tried by such Court and when no Court is so mentioned, may be tried by the High Court or any other Court by which such offence is shown in the First Schedule to be triable. The offence under MCOCA is triable by the Special Court constituted under section 5 of MCOCA. It is thus clear that the special court constituted under section 5 of MCOCA is covered by Section 26(b) of the Code. Section 36 in Chapter IV deals with the powers of superior officers of police. It provides that police officers superior in rank to an "officer-in-charge of a police

station" may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station. Officer-in-charge of a police station, defined in clause (o) of section 2, includes the police officer present at the station-house who is next in rank to such officer and is above the rank of a constable when the officer-in-charge of the police station is absent from the station-house or unable from illness or other cause to perform his duties, or, when the State Government so directs, any other police officer so present.

65. Then it must be noticed that whenever a complaint within the meaning of section 2(d) is received by a Magistrate he has two options to follow under the provisions contained in Chapter XII and Chapter XIV of the Code. Chapter XV of the Code further provides the procedure when a Magistrate decides to take cognizance under section 190 (1)(a) in Chapter XIV of the Code.

66. Chapter XII of the Code, which comprises sections 154 to 176, relates to information to police and their powers to investigate. Section 154 deals with information in cognizable cases. Section 156 of the Code with which we are primarily concerned in this group of writ petitions reads thus:

> "156. Police officer's power to investigate cognizable cases -- (1) Any officer in charge of a police station may, without the order of Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.
>
> (2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.
>
> (3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned".

This section deals with the powers of police officer to investigate cognizable cases. Sub-section (3) with which we are concerned in particular, provides that any magistrate empowered under section 190 to take cognizance of the offences, may order such investigation as contemplated under sub-section (1) of Section 156. On completion of investigation undertaken under section 156 (1) the officer-in-charge of the police station is required under section 173(2) to forward to a Magistrate empowered to take cognizance of the offence on a "police report", a report in the form prescribed by the State Government containing all the particulars mentioned therein.

67. Chapter XIV of the Code lays down the conditions requisite for initiation of proceedings by the Magistrate. Section 190(1) which occurs in Chapter XIV may be reproduced at this stage which reads thus:

> "190. Cognizance of offences by Magistrates --
>
> (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence --
>
> (a) upon receiving a complaint of facts which constitute such offence;
>
> (b) upon a police report of such facts;
>
> (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed".

A plain reading of this section would show that under sub-section (1) any Magistrate of the first class or any Magistrate of the second class specially empowered "may take cognizance" of any offence (a) upon receiving a complaint of facts which constitutes such offence; (b) upon a "police report" of such facts; or (c) upon information received from any person other than a police officer or upon his own knowledge that such offence has been committed. Chapter XV of the code comprising sections 200 to 203 prescribes the procedure the Magistrate has to initially follow if it takes

cognizance of an offence on a complaint under section 190(1)(a).

68. A conjoint reading of the above provisions would show that when a "complaint" disclosing a cognizable offence is made before a Magistrate, he "may take cognizance" of the same under section 190(1)(a) of the Code and proceed with the same in accordance with the provisions of Chapter XV. The other option available to the Magistrate in such a case is to send the complaint to the appropriate police station under section 156(3) for investigation. Once such a direction is given under sub-section (3) of section 156, the police are required to investigate into that complaint under sub-section (1) thereof and on completion of investigation to submit a "police report" in accordance with section 173 (2) on which the Magistrate "may take cognizance" under section 190(1)(b) but not under section 190(1)(a). A complaint filed before a Magistrate cannot be a police report in view of the definition of a complaint referred to earlier and it is further clear that the investigation of a "cognizable case" by the police under section 156(1) ultimately culminates in a police report under section 173(2) of the Code. This position of law is explained by the Apex Court in **Madhu Bala Vs.Suresh Kumar and ors, AIR 1977 SC 3104**.

69. Thus, it would be seen that while Chapter XIV deals with the post cognizance stage, Chapter XII, comprising of Sections 156 and 173, deals with pre-cognizance stage. Sections 190 and 156(3) are mutually exclusive and function in totally different spheres. A Magistrate can order investigation under section 156(3) only at the pre-cognizance stage, that is to say, before taking cognizance under sections 190, 200 and 204 and where a Magistrate decides to take cognizance under the provisions of Chapter XIV, in law he need not order any investigation under section 156(3) though in cases not falling within the proviso to section 202 he can order an investigation by the police which would be in the nature of an enquiry as contemplated by section 202 of the Code. This is settled by the Apex Court in **Tula Ram and ors Vs. Kishor Singh, (1977) 4 SCC 459** while interpreting the expression "taking cognizance". Thus, the law is no more res integra and it is settled by the Apex Court in a long series of Judgments that passing order under section 156(3) is a precognizance stage and such order cannot be construed to mean that a Magistrate has taken cognizance of the offence disclosed in the complaint. Insofar as powers of the Magistrate are concerned, the aforestated position of law was not disputed by the

learned counsel appearing for the petitioners in this group of writ petitions. However, the question raised and falls for consideration is whether the Special Court constituted by sections 5 of MCOCA can exercise the aforesaid powers of a Magistrate. We will deal with this question little later.

70. To consider the question referred to for our consideration and to appreciate the arguments advanced by the learned counsel for the parties it would be advantageous to reproduce Sections 9(1) and 23 of MCOCA which read thus:

> "9. Procedure and powers of Special Court -
>
> (1) A Special Court may take cognizance of any offence without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence or upon a police report of such facts.
>
> 23. Cognizance of, and investigation into, an offence - (1) Notwithstanding anything contained in the Code-
>
> (a) no information about the commission of an offence of organised crime under this Act, shall be recorded by a police officer without the prior approval of the police officer not below the rank of the Deputy Inspector General of Police;
>
> (b) no investigation of an offence under the provisions of this Act shall be carried out by a police officer below the rank of the Deputy Superintendent of Police.

> (2) No Special Court shall take cognizance of any offence under this Act without the previous sanction of the police officer not below the rank of Additional Director General of Police."

71. In section 9(1) of MCOCA the phraseology employed may be noticed at this stage. A Special Court "may take cognizance" of any offence without the accused being committed to it for trial, upon receiving a "complaint" of facts which constitute such offence or upon a "police report" of such facts. Keeping this provision in view if we hold that the provisions of Sections 156 and 190 of the Code are not inconsistent with the provisions of MCOCA and in particular with section 23 thereof and that the Special Court while dealing with a "complaint" under section 9(1) can exercise those powers conferred on the Magistrate then the Special Judge will have an option to take cognizance of the complaint under section 190(1)(a) and proceed in accordance with the provisions of Chapter XV of the Code or to direct investigation under section 156(3) and on receipt of a "police report" under section 173(2) "may take" cognizance of such complaint under section 190(1)(b) of the Code.

72. The provisions of section 23 of MCOCA deal with cognizance of, and investigation into, an offence. Sub-section (1) of section 23 deals with the powers of

investigating agency whereas sub-section (2) deals with the powers of the Special Court to take cognizance subject to previous sanction. Sub-section (1) begins with a non-obstante clause. Clause (a) thereof provides that notwithstanding anything contained in the Code, " no information" about the commission of an offence of organised crime under MCOCA,shall be recorded by a police officer without the "prior approval" of the police officer not below the rank of the Deputy Inspector General of Police. Clause (b) of sub-section (1) provides that notwithstanding anything contained in the Code, no investigation of an offence under the provisions of MCOCA shall be carried out by a police officer below the rank of the Deputy Superintendent of Police. Sub-section (2) of Section 23 deals with the power of the Special Court by which no Special Court is empowered to take cognizance of any offence under MCOCA without the "previous sanction" of the police officer not below the rank of the Deputy Superintendent of Police. A bare perusal of section 23 makes it explicitly clear that it provides threefold protections/safeguards before the Special Court takes cognizance of any offence under this Act i.e, (i) prior approval for recording and registration of an "information"; (ii) investigation by a senior police officer; and (iii) the previous sanction for taking

cognizance of the offence under MCOCA. The submission that these protections cannot be whittled down or rendered nugatory by maintaining a private complaint and by passing an order under section 156(3) of the Code, will stand addressed at the end of this judgment.

73. The Supreme Court had an occasion to consider the provision of Section 20A (1) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (for short, "TADA"), which is para materia with clause (a) of sub-section (1) of Section 23 of MCOCA, in **Mukhtiar Ahmed Ansari Vs State (N.C.T. of Delhi), (2005) SCC (Cri) 1037**. This judgment was heavily relied upon by the petitioners. The Supreme Court while considering the aforesaid provision of TADA observed that it clearly lays down that no information about the commission of an offence under TADA is to be recorded **by the police** without prior permission of the District Superintendent of Police and "such prior permission is a condition precedent for registering a case under TADA". From the facts of that case, it is clear that the cognizance was taken on the basis of the "first information report" recorded by the police and not on the basis of a "private complaint" and the Supreme Court was dealing with the submission that the proceedings could not have been initiated in the absence of "prior approval" of the

District Superintendent of Police as required under sub-section (1) of Section 20A of TADA. Against that backdrop the Supreme Court held that the police have no power to record and register "first information report" about the commission of an offence under TADA without prior approval of the District Superintendent of Police. Indubitably, that analogy would apply only if the "first information report" is recorded by the police officer without prior approval an officer not below the rank of the Deputy Inspector General of Police, as provided for in sub-section (1)(a) of Section 23 of MCOCA, of the offence of organised crime under that Act and in that case the proceedings would vitiate and conviction, if any, will be liable to be set aside. In other words, the prior approval under section 23(1)(a) is a condition precedent for recording first information report **"by the police**" about the commission of an offence of organised crime under MCOCA. It may be noticed, at this stage, that the Supreme Court in **Mukhtiar Ahmed Ansari's** case was not considering the provision of Section 14(1) of TADA and the word "complaint" occurred therein which is para-materia with Section 9(1) of MCOCA.

74. Similarly, the Supreme Court also had an occasion to deal with the provisions of Section 20A(2) of TADA in **Rambhai Nathabhai Gadhvi and others Vs. State of**

Gujarat (1997) 7 SCC 744. The provisions of sub-section (2) of Section 23 of MCOCA are para materia with section 20(A) (2) of TADA. It will be useful to refer to the observations made in paragraph 8 of that judgment which reads thus:

> "8. Taking cognizance is the act which the Designated Court has to perform and granting sanction is an act which the sanctioning authority has to perform. Latter is a condition precedent for the former. Sanction contemplated in the sub-section is the permission to prosecute a particular person for the offence or offences under TADA. We must bear in mind that sanction is not granted to the Designated Court to take cognizance of the offence, but it is granted to the prosecuting agency to approach the Court concerned for enabling it to take cognizance of the offence and to proceed to trial against the persons arraigned in the report. Thus a valid sanction is sine-qua-non for enabling the **prosecuting agency** to approach the Court in order to enable the Court to take cognizance of the offence under TADA as disclosed in the report. The corollary is that, if there was no valid sanction the Designated Court gets no jurisdiction to try a case against any person mentioned in the report as the Court is forbidden from taking cognizance of the offence without such sanction. If the Designated Court has taken cognizance of the offence without a valid sanction, such action is without jurisdiction and any proceedings adopted thereunder will also be without jurisdiction." (emphasis supplied)

It is clear from the facts of this case that the cognizance of the offence under the provisions of TADA was taken on the basis of the information recorded by the police and not on the basis of a "private complaint"

and against that backdrop the Apex Court had observed that taking cognizance of the offence without "valid sanction" is without jurisdiction and any proceedings adopted thereunder will also be without jurisdiction. A plain reading of sub-section (2) of Section 23 in the light of the aforesaid observations would clearly show that the previous sanction as contemplated therein is sine-qua-non in order to enabling the Special Court to take cognizance of the **"offence**" under MCOCA recorded "**on information to the police**". In other words, a valid sanction is sine-qua-non for enabling the prosecuting agency to approach the Court in order to enable it to take cognizance of the offence under MCOCA as disclosed in the police report forwarded by the competent police officer after carrying out an investigation with prior approval as contemplated by section 23(1) of MCOCA. It is thus clear that the ratio laid down by the Supreme Court in both these cases would apply whenever the offence under MCOCA is recorded on the information to the police, investigated and taken cognizance of by the Special Court without "prior approval" and "sanction" as contemplated by section 23 of MCOCA and in that case the proceedings would vitiate. It is very pertinent to notice that in both the aforestated cases the provision of section 14(1) of TADA which is para materia with section 9(1) of MCOCA and the question whether a private

complaint is tenable and directions for investigation could be given under section 156(3) of the Code was not under consideration of the Supreme Court. However, the question that falls for our consideration is whether sanction contemplated by section 23(2) is sine-qua-non for taking cognizance upon receiving a private complaint as contemplated by section 9(1) of MCOCA.

75. The scheme of Section 23 of MCOCA would show that the Special Court requires to take cognizance of any offence of organised crime only upon a strict compliance of the conditions enumerated in clauses (a) and (b) of sub-section (1) and with the previous sanction of the police officer not below the rank of Additional Director General of Police as provided in sub-section (2) thereof. In other words, unless all the three conditions contemplated under section 23 are strictly complied with, the Special Court has no power to take cognizance of any offence of organised crime under MCOCA and if they are complied with it has no option but to take cognizance. Sub-section (2), though is an independent sub-section, in our opinion, has a force of proviso to sub-section(1) In short, section 23 provides for three conditions/safeguards and they are all mandatory. In the absence of "prior approval" and "previous sanction" as provided for under section

23(1)(a) and 23(2), and unless investigation is being carried out by the competent officer as required under section 23(1)(b), no information about the commission of an offence of an organised crime under MCOCA can be recorded, investigated and taken cognizance of by the Special Court. Section 9(1), however, does not stipulate such conditions. The learned Advocate General vehemently submitted that the conditions stipulated in section 23 are mandatory for the Special Court to take cognizance of even a private complaint under section 9(1). He further submitted that the Special Court cannot pass an order under section 156(3) of the Code and the only option is to forward such complaint to the police for appropriate action under section 23. In other words, unless police machinery steps in and grants sanction, as provided for in section 23, a private complaint cannot be taken cognizance of.

76. In criminal jurisprudence, the police always act under the direct control of the Court and have to take orders from it at every stage of an enquiry or investigation or trial, as case may be, particularly when the enquiry or investigation is being conducted on the directions of the Court. The Court exercises an overall control on the action of the police officer in every such case either before or after taking

cognizance. Police do not control the Court or the Court does not take orders from the police. The whole set up of Court is for the purposes of administration of justice, and the control which the Judge exercises over the police has also the object of maintaining purity of administration of justice. The Court does perform multifarious function for due administration of justice. Keeping these principles in view and for the reasons recorded in this judgment, the submission that the Special Court has no powers to direct investigation under section 156(3) or to take cognizance of a private complaint under section 9(1) unless all the three conditions stipulated in Section 23 of MCOCA are strictly complied with, must be rejected. If the powers of Court are made subject to control of the police machinery then it will virtually result in mockery of justice and defeat the very mandate of Article 21 of the Constitution of India. Powers of Court are wide enough to protect interest of everyone who is before it.

77. The legislature did not find it necessary to put fetters/conditions on the powers of the Special Court, as they are put on the police machinery in Section 23 of MCOCA. The legislature was conscious of the fact that the Special Court is competent enough to take care of the object of putting fetters on the powers of police

under section 23 before taking cognizance of a private complaint received under section 9(1) and has, therefore, not made the powers of the Court subject to such conditions. In short, keeping in view the SOR, it appears to us that the legislature did not find it necessary to make powers of the Court subject to "prior approval" and "previous sanction" of the police machinery while dealing with a private complaint. Making previous sanction under sub-section (2) of Section 23 as a condition precedent for taking cognizance is understandable and seems to be reasonable in view of the conditions imposed on the police machinery under Section 23(1) of which strict compliance is mandatory before grant of sanction. In other words, it is only after strict compliance of the conditions stipulated in sub-section (1) and (2) of Section 23 the Special Court is empowered to take cognizance under sub-section (2). That appears to be the reason why phraseology "shall take cognizance" has been employed in sub-section (2) of Section 23 of MCOCA.

78. At this stage, it would be appropriate to look into the relevant provisions of POTA with which the Division Bench in Criminal Appeal No.1451 of 2003 was primarily concerned. The provisions of Sections 29(1) and 50 of POTA and sections 9(1) and 23 of MCOCA are

somewhat similar, though not identical. Section 29(1) of POTA reads thus:-

> "29. Procedure and powers of Special Courts:-
>
> (1) subject to the provisions of Section 50, a Special Court may take cognizance of any offence, without the accused being committed to it for trail, upon receiving a complaint of facts that constitute such offence or upon a police report of such facts."

A bare perusal of this provision would show that, subject to the provisions of Section 50, a Special Court can take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts that constitute such offence or upon a police report of such facts. The power of the Court is expressly made subject to the provisions of Section 50. The difference of language between this provision and section 9(1) of MCOCA is apparent. The power of the Special Court under section 9(1) is not made subject to any other provisions in MCOCA. Section 50 of POTA reads thus:

> "50. Cognizance of offences:- No Court shall take cognizance of any offence under this Act without the previous sanction of the Central Government or as the case may be, the State

Government."

Section 50 of POTA empowers the Court to take cognizance of any offence under that Act only with the previous sanction of the Central Government or as the case may be, the State Government. A bare perusal of this section makes it explicitly clear that previous sanction is mandatory for taking cognizance of any offence under POTA and the powers of the Special Court under section 29(1) are made subject to that provision. Keeping in view the statement of object and reasons and the role of the Central as well as State Governments in the cases of terrorism, the legislature in its wisdom made the provisions of Section 29(1) subject to the provisions of Section 50. Such control on the powers of the Special Court does not find place in section 9(1) of MCOCA.

79. We would also like to consider, at this stage, the submission advanced on behalf of the petitioners that in the face of the provisions of sub-section (1) of Section 23, which provide for an investigation of an offence under MCOCA by a police officer not below the rank of the Deputy Superintendent of Police, whether the investigation could be made over to an officer-in-charge of a police station as contemplated by sub-section (1) of Section 156 of the Code. It was further submitted

that there may be occasions of a private complaint being filed against the police officer superior in rank to the officer-in-charge of a police station or against a public servant holding higher rank in which case it would not be proper to direct an officer-in-charge of a police station to carry out investigation under section 156(3), of the offences under MCOCA. It is true that the primary responsibility for conducting investigation into offences in cognizable cases vests with officer-in-charge of a police station. Section 156(3) of the Code empowers a Magistrate to direct such officer in charge of the police station to investigate any cognizable case over which such Magistrate has jurisdiction. Though a Magistrate under Section 156(3) can only direct an officer-in-charge of a police station to conduct such investigation and not a superior police officer, nevertheless, when such an order is passed, any police officer superior in rank of such officer, can as well exercise the power to conduct an investigation, and all such investigations would then be deemed to be the investigation conducted by the officer in-charge of a police station. Section 36 of the Code is not meant to substitute the magisterial power envisaged in Section 156(3) of the Code, though it could supplement the powers of an officer in charge of a police station. It is permissible for any superior officer of police to

take over the investigation from such officer in charge of the police station either suo motu or on the direction of the superior officer or even that of the Government. However, the magisterial power cannot be stretched under section 156(3) beyond directing the officer in charge of a police station to conduct the investigation, as noted by the Supreme Court in **CBI Vs. State of Rajasthan, (2001) 3 SCC 333**. It is true that the Special Court, while exercising the powers under section 156(3) of the Code, can only direct an officer-in-charge of a police station to conduct such investigation. But when such order is passed, any police officer superior in rank of such officer can as well exercise the power to conduct an investigation, and all such investigations would then be deemed to be the investigation conducted by the officer-in-charge of a police station. Section 36 of the Code clearly empowers any superior officer of police to take over the investigation from officer-in-charge of a police station either suo motu or on the direction of the superior officer or even that of the Government. In other words, it is always open for the police machinery or the Government, in the event of an order under section 156(3) of the Code, to take over the investigation from the officer-in-charge of a police station by the superior officer either suo motu or on the direction of

the Government.

80. A plain reading of Section 9(1) of MCOCA would show that it is not controlled by any other provisions of MCOCA much less section 23 which primarily deals with the powers of the police machinery. Section 9(1) is an independent section which confers powers on the special Court and they are not made subject to supervision/control of the police. The police machinery cannot decide whether the Special Court should take cognizance if it receives private complaint. By using the expression "may take cognizance" in Section 9(1) the Special Court is empowered to "take or not to take" cognizance of any offence under MCOCA without the accused being committed to it for trial, upon receiving a "private complaint" of facts which constitute such offence or upon a police report of such facts forwarded, after completing the investigation, under section 173(2) of the Code. In other words, section 9(1) of MCOCA does away with the requirement of committing the accused to the Special Court for trial and states that cognizance can be taken upon receiving a complaint of facts which constitute such offence or upon a police report of such facts. The word "may" in Section 9(1) in any case cannot be construed to mean "must" and it retains its meaning "may" for the reasons recorded earlier. As

against this, Section 23 deals with the cognizance of and investigation into an "information" recorded by a police officer after strict compliance of the conditions stipulated therein.

81. A conjoint reading of Sections 9 and 23 of MCOCA would show that a clear distinction is made between a "complaint" contemplated by section 2(d) of the Code and recording of an "information" by the police about the commission of an offence of organised crime. Reference to "police report" in Section 9(1) is to the report under section 173(2) of the Code which police would forward to the Special Court on completion of the investigation directed under section 156(3) of the Code. Though there is no specific reference to a police report in Section 23, the Special Court is empowered to take cognizance of a report being filed after completing the investigation of the "information" recorded and investigated as provided for in sub-section (1) of Section 23 of MCOCA. The word "information" in Section 23(1) means "first information report" contemplated by section 154 in Chapter XII of the Code inasmuch as it has not been defined in MCOCA. A reference to "police report" in sub-section (1) of Section (9) and "police report" contemplated by section 23 are independent of each other. In other words, a "police report" in

sub-section (1) of Section 9 means a report that would be forwarded by the police on completion of the investigation under section 173(2) of the Code made on the basis of the "private complaint". Whereas a "police report" under section 23 would be on the basis of an "information" recorded by the police and after carrying out the investigation by a senior police officer with the prior approval under sub-sections (1) (a) of Section 23. This is further clear from the language of Sections 9(1) and 23(2). The phraseology employed in Section 9(1), "may take cognizance" empowers the Special Court to take or not to take cognizance of a "complaint" or a "police report" whereas under section 23(2) the phraseology employed is "shall take cognizance". No option is left to the Special Court for the reasons recorded earlier. Thus, Section 9(1) and Section 23 are independent of each other and work in a totally different sphere. The language or the phraseology employed by the legislature is precise and plain and it proclaims the legislative intent in unequivocal terms and hence the same must be given effect to, regardless of the consequences that may follow. It is against this backdrop, though we agree with the opinion expressed by the Division Bench in Criminal Writ Petition No.1772 of 2004 holding that the Special Court has power to take recourse to the provisions of the Code while dealing

with a private complaint, we find it difficult to persuade ourselves to agree with the view that the provisions of section 23(2) of MCOCA are sine-qua-non for taking cognizance of a complaint under section 9(1). Except the conclusions arrived at in paragraph 39(b) and (c) partly of that judgment, we agree with all other conclusions arrived at in the Judgment of the Division Bench in Criminal Writ Petition No.1772 of 2004. Similarly we are unable to persuade ourselves to agree with the ratio laid down by the Division Bench in Criminal Appeal No.1451 of 2004 decided vide Judgment pronounced on 21.12.2004, requiring a private complainant to approach the police agency and/or requiring the Special Court to forward such complaint received from a private individual for compliance of the conditions stipulated in Section 23 of MCOCA.

82. Let us add some more reasons for not agreeing with the conclusion in paragraph 39(b) of the judgment in Criminal Writ Petition No.1772 of 2004. Sanction under section 197 of the Code and sanction under section 23(2) of MCOCA are totally independent of each other and cannot be equated for any purpose whatsoever. Section 197 of the Code makes requirement of obtaining sanction of prosecuting a "public servant" mandatory. The bar under section 197 is absolute and complete and the Court

cannot take cognizance of a complaint of facts disclosing any offence alleged to have been committed by a public servant **while acting or purporting to act in discharge of his official duty** unless the previous sanction is obtained from the appropriate authority. The object for the protection offered by section 197 is the public interest in seeing that the official acts do not lead to endless or vexatious prosecution. It should be left to the Government to determine from the point of view the question of expediency of prosecuting any public servant. In other words, the object and purpose underlying this section is to afford protection to public servants against frivolous, vexatious or false prosecution for offences alleged to have been committed by them while acting or purporting to act in the discharge of their official duty. This section is designed to facilitate an effective and unhampered performance of their official duty by public servants by providing for scrutiny into the allegations of commission of offence by them by their superior authorities and prior sanction for their prosecution as a condition precedent to the cognizance of the cases against them by the Courts, as noted by the Supreme in **Bhagwan Prasad Srivastava V. N.P.Mishra, (1970) 2SCC 56.** It is also well settled that where the offence committed by a public servant is not one while he is

acting or purporting to act in the discharge of his official duty as such offence has no necessary connection between it and the performance of the duties of a public servant, the official status furnishing only the occasion or opportunity for the commission of the offences, he is not entitled to claim the protection of Section 197(1) of the Code. The Supreme Court has made this clear in **Manohar Nath Kaul V. State of J & K, (1983) 3 SCC 429**. In **Director of Inspection and Audit Vs. C.L.Subramaniam, 1994 Supp (3) SCC 615**, the Supreme Court has observed that in order to apply the provisions of Section 197 Cr.P.C two conditions must be fulfilled; one is that the offence mentioned therein must be committed by a public servant and the other is that the public servant employed in connection with the affairs of the Union or a State is not removable from his office save by or with the sanction of the Central Government or the State government, as the case may be. The object of the section is to provide guard against vexatious proceedings against the public servants and to secure the opinion of superior authority whether it is desirable that there should be a prosecution. As against this, sanction contemplated by section 23(2) is with an object to afford protection or safeguard before prosecuting a person, irrespective of his status whether or not he is a public servant, under the stringent and

deterrent provisions of MCOCA. No special protection has been provided to a public servant under the provisions of MCOCA though it provides punishment to the public servants also. Since in the instant petitions we are not concerned with the question that whether in the instant petitions the previous sanction under section 197 of the Code is necessary for prosecuting a public servant under the provisions of MCOCA we refrain from expressing any opinion on this question. In any case, the object of sanction under section 197 of the Code and sanction under section 23(2) of MCOCA are distinct. We, therefore, find it difficult to agree with the observations made by the Division Bench in Criminal Writ Petition No.1772 of 2004 in paragraph 39(b) of their judgment.

83. It is true that the provisions of this Act are very harsh and drastic containing stringent and deterrent provisions and provide for minimum punishment and in some other offences enhanced penalty also. It is also true that to avoid misuse of the application of the provisions of MCOCA, the safeguards under section 23 have been provided. However, the misuse contemplated is not by the Court but by the police. The powers of the Special Court under section 9(1) are not controlled by Section 23. The legislature never intended to leave

anyone remediless and the Court powerless to move against persons involved in an organised crime, particularly if such crime either has not been known to or noticed by the police or there is total inaction on the part of the police. If the acts of miscreants attract the provisions of MCOCA, as observed earlier, even a private individual has a right to approach the Special Court under section 9(1) and in that case the Court is empowered to move on receiving a complaint of facts which, to the mind of the Special Court, constitute offence under MCOCA. A person involved in an organised crime or a member of an organised crime syndicate cannot be allowed to go scot-free, irrespective of his status and regardless of the consequences that may follow, merely because the police are either not aware of his activities or there is total inaction on their part for whatsoever reason. If the Court is satisfied of the prima facie case and decides to proceed against such person it cannot be left at the mercy of police machinery.

84. The Special Court, however, while dealing with the private complaint under sub-section (1) of section 9 of MCOCA should exercise its power to direct investigation under section 156(3) and/or to take cognizance of such complaint sparingly, cautiously and

only if the allegations made in the complaint, prima facie, constitute an offence under the provisions of MCOCA. In other words, the learned Special Judge should examine the complaint and see whether all the ingredients to constitute an offence of organised crime prima facie exist in such complaint, requiring him to proceed against the accused either under section 156(3) or Section 190(1)(a) of the Code. The Special Court is not expected to act merely as a post office of the investigating agency by forwarding the complaint to the investigating agency under section 156(3) of the Code without being satisfied the allegations made in the complaint do constitute an offence under MCOCA. The Special Court, while doing so, should keep all the time in view a serious and drastic consequences of directing investigation under section 156(3) of the Code. In a given case, it would be appropriate for the Special Court to see who is the complainant?; why is he approaching the Court directly?; whether an attempt has been made to approach the police?; his antecedents and interest, if any, in filing such complaint etc. This does not mean that the learned Judge should embark upon an enquiry as to the reliability or genuineness or otherwise of the complaint. It is also not necessary that in every private complaint filed before the Special Court, it should direct investigation under section

156(3). The other option, in view of the peculiar facts and circumstances of the case, open to the Court is to transmit the complaint to the Deputy Inspector General of Police for appropriate action under section 23(1) of MCOCA. This option may be exercised by the Special Court when it finds that the allegations are serious and it is doubtful about the bonafides and intention of the complainant.

85. For arriving at the aforesaid conclusions and in support thereof, we would like to further examine whether the Special Court can exercise the powers conferred on the Magistrate by Chapters XII, XIV and XV of the Code as a Court of original jurisdiction and whether such powers conferred on the Magistrate are inconsistent with the provisions of MCOCA. However, before we proceed further, we would like to deal with the submission of the learned Advocate General that though sub-section (1) of Section 9 contemplates private complaint, the only role that should be played by the Special Court is to forward such complaint to the police to act on the same in accordance with the provisions of Section 23 of MCOCA. In other words, the role of a Special Court is not more than a post office of the investigating agency. The intent of the legislature as discussed earlier is clearly reflected in the provisions

of MCOCA. The legislature in its wisdom provided for private complaint of facts constituting an offence under MCOCA which, in our opinion, is not an empty formality. Had the legislature intended the Special Court to act as a post office it would have made such intention clear in the Act itself. There is no express provision in the Act requiring the Special Court to forward such complaint for complying with the provisions of Section 23 and then to proceed further.

86. It was strenuously urged that the provisions of Sections 156 and 190 read with the provisions of Chapter XV are inconsistent with the provisions of Section 23 of MCOCA. We have already observed that the provisions of section 9 (1) are independent of the provisions of Section 23 and they are not controlled or subject to the provisions of section 23. Section 9(1) independently gives powers to the Special Court to entertain a "complaint" or a "police report" and decide whether or not to take cognizance of any offence under MCOCA. It is well settled rule of interpretation that a statute has to be construed according to the intent of them that make it and the duty of the Court is to act upon the true intention of the legislature. Further the provisions of the Statute are meant for its enforcement and that should be the approach while dealing with such

provisions. Reading of MCOCA as a whole would show that whenever and wherever the legislature intended the provisions of the Code to be followed or not to be followed, it has so indicated by employing a non obstante clause in all such provisions. For instance, Section 6 which deals with jurisdiction of a Special Court. It begins with non-obstante clause and declares that notwithstanding anything contained in the Code, every offence punishable under this Act shall be triable only by the Special Court within whose local jurisdiction it was committed, or as the case may be, by the Special Court constituted for trying such offence under sub-section (1) of Section 5. By employing a non-obstante clause, the legislature made it clear that under any circumstances jurisdiction of the Special Court would be controlled by this provision and not by the provisions of the Code. There are several such provisions in MCOCA which begin with a non-obstante clause including Section 23. Section 21 deals with modified application of certain provisions of the Code which also begins with a non-obstante clause. Sub-section (1) of Section 21 of MCOCA clearly provides that notwithstanding anything contained in the Code or in any other law, every offence punishable under this Act, shall be deemed to be a cognizable offence within the meaning of clause (c) of Section 2 of the Code and

"cognizable case" as defined in that clause shall be construed accordingly. Sub-section (2) of section 21 has modified section 167 of the Code. Sub-section (3) bars the application of section 438 of the Code. Sub-sections (4), (5) and (6) further put fetters on the powers of Court for release of the accused on bail. Section 25 provides for overriding effect of the provisions of MCOCA, which states that the provisions of MCOCA or any rule made thereunder or any order made under any such rule shall, have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having the force of law. It is thus clear that the provisions of the Code can be taken recourse to by the Special Court as long as such access is not denied by employing a non-obstante clause and the provisions to which recourse was taken by the Special Court, are not inconsistent with the provisions of MCOCA.

87. The legislature can create a Special Court to deal with a special problem. It can also create new procedures within the existing system. The MCOCA is a special Act and creates a new class of offences called "Organised Crimes" as defined in Section 2(1)(d)(e) and (f) and provides for a special procedure for the trial of such offences. No doubt, the legislature by the use

of the words "as if it were" in section 9(4) of the Act vested a special court with the status of a Court of Session. But looking to the scheme of the Act, it is a Court of original jurisdiction and not strictly a Court of Session as defined under section 6(i) of the Code. It is conferred with powers under section 190 of the Code and, therefore, bar under section 193 does not operate against the special Court. There is a total departure from different classes of Criminal Courts enumerated in Section 6 of the Code. Under the Code, Session Court has no powers, except as otherwise expressly provided by any other law for the time being in force, to take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under the Code. The MCOCA does confer the status of a Court of Session on the special Court for the purposes of trial of any offence and empowers it to take cognizance of any offence as a Court of original jurisdiction. Bar under section 193 on the powers of Session Court, therefore, does not operate against the special Court constituted under section 5 of MCOCA. It is, therefore, seen that the Special Court can exercise the powers of a Court of original jurisdiction, i.e. a Magistrate conferred under the Code, as long as they are not inconsistent with the provisions of MCOCA.

88. That takes us to add some more reasons to hold that a Special Judge under section 9(1) of MCOCA is a Magistrate and has powers to proceed under Sections 156(3) and 190 of the Criminal Procedure Code. Section 9(1) of MCOCA does away with the requirement of committing the accused to the Special Court for trial and states that cognizance can be taken upon receiving a complaint of facts which constitute such offence or upon a police report of such facts. On fair reading of the provisions of MCOCA it appears to us that the Court of Special Judge is a Court of original criminal jurisdiction. In order to make it functionally oriented, some powers are conferred on it by MCOCA which has set it up. The Division Bench of this Court in Criminal Writ Petition No.1772 of 2004 has rightly held that "no debate is necessary where powers are specifically conferred on or specifically denied to it." On a proper reading of section 9(1) and on the basis of basic principles of criminal jurisprudence enunciated by the Supreme Court in A.R.Antulay's case, in our opinion, under section 9(1) a Special Court can, therefore, not only entertain a "private complaint" but can also take recourse to Section 156(3) of the Code. In the case of **A.R.Antulay Vs. Ramdas Sriniwas Nayak and anr, AIR 1984 SC 718**, the Constitution Bench while interpreting the

provisions of the Prevention of Corruption Act, 1947, and considering implication of Section 8(1) of the Criminal Law Amendment Act, 1952 (for short, "1952 Act") once again clarified the procedural law to be followed by the Special Court. Section 8(1) as introduced by 1962 Act, reads thus:

> "8. Procedure and powers of special judge - (1) A special judge may take cognizance of offences without the accused being committed to him for trial, and in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1898 (Act V of 1898), for the trial of warrant cases by magistrates."

The scheme of the above section is on the lines of the scheme of Section 9(1) and 9(4) of MCOCA as observed by the learned Single Judge in **Dayanand B.Nayak Vs.Ketan K.Tirodkar and Anr, 2004 All.M.R.(Cri) 1689**. We agree with the opinion expressed by the learned Single Judge in that case which has been upheld by the Division of this Court in Criminal Writ petition No.1772 of 2004. In Antulay’s case (supra), while dealing with the powers of the Special Court under the Prevention of Corruption Act, the Constitutional Bench made reference to the provision of Section 8(1) of 1952 Act and has observed that "in order to give full effect to Section 8(1), the only thing to do is to read Special Judge in Sections 238 to 250 wherever the expression Magistrate occurs.

This is what is called legislation by incorporation. Similarly, where the question of taking cognizance arises, it is futile to go in search of the fact whether for purposes of Section 190 which conferred power on the Magistrate, to take cognizance of the offence, Special Judge is a Magistrate. What is to be done is that one has to read the expression Special Judge in place of Magistrate, and the whole thing becomes crystal clear. The Legislature wherever it found the grey area clarified it by making specific provisions such as the one in sub-section (2) of Section 8 and to leave no one in doubt further provided in sub-section (3) that all the provisions of the Criminal Procedure Code shall so far as they are not inconsistent with the Act apply to the proceedings before a Special Judge". The Apex Court further observed that "the net outcome of this position is that a new Court of original jurisdiction was set up and whenever a question arose as to what are its powers in respect of specific questions brought before it as Court of original criminal jurisdiction it had to refer to the Criminal Procedure Code undauntedly by any designation claptrap. When taking cognizance, a Court of Special Judge enjoyed the powers under Section 190. When trying cases, it is obligatory to follow the procedure for trial of warrant cases by a Magistrate though as and by way of status it was equated with a

Court of Session."

89. Keeping the aforesaid enunciation in the judgment of Antulay's case in view, if we go back to Section 9 of MCOCA we find that the Special Judge is for some purposes deemed to be a Sessions Judge and for some other purposes deemed to be a Magistrate and some powers exercised by the Magistrate are conferred on him. The Special Judge under section 9(1) is empowered to take cognizance without the accused being committed and while trying the accused persons he is required to follow the procedure for trial as a Court of Session as contemplated under sub-section (4) of Section 9 of MCOCA. It is thus clear that while exercising powers conferred under sub-section (1) of Section 9, the Special Court exercises powers of Magistrate and while trying the accused it exercises the powers of Court of Sessions under Sub-section (4) of Section 9. In other words the Special Court for taking cognizance of any offence is a Court of original jurisdiction and for trying the accused it functions as a Court of Sessions. Moreover, the Court of Sessions has no inherent power to order investigation especially in view of bar under section 156(3), 190, 193,195 and 340 of the Code, nor can Sessions Court direct Inspector General of Police or a particular officer to conduct investigation. This

bar, however, would not operate against the Special Court constituted under section 5 of MCOCA since it is a Court of original criminal jurisdiction. It is in this view of the matter, I have no hesitation in holding that the Special Judge under section 9(1) of MCOCA is a Magistrate and can exercise the powers under section 156(3) and 190 of the Code.

90. What broadly emerges from the above discussion and, which, in our opinion, is a clear answer to the question referred to for our consideration, is outlined as follows:

(i) A private complaint under section 9(1) of MCOCA is tenable.

(ii) The Special Court, on receipt of a private complaint under section 9(1) of MCOCA, has the power to order an investigation under section 156(3) of the Code and upon receipt of a police report may or may not take cognizance of any offence under MCOCA. It can also reject such complaint outright if it does not disclose offence under MCOCA.

(iii) Any officer-in-charge of a police station or police officer superior in rank to such officer, as the

case may be, can investigate any offence under MCOCA as and when such investigation is directed by the Special Court under section 156(3) of the Code and forward a report to the Special Court as provided for under section 173(2) of the Code. Compliance of the conditions mentioned in clauses (a) and (b) of sub-section (1) of Section 23 are not the conditions precedent for investigating a private complaint pursuant to the directions of the Special Court.

(iv) The Special Court will have the power to take cognizance of any offence under MCOCA either upon receipt of a private complaint of facts which constitute such offence or upon a police report forwarded under section 173(2) of the Code after completion of the investigation pursuant to the directions under section 156(3) of the Code and for which previous sanction under section 23(2) of MCOCA shall not be a condition precedent. In other words, the sanction under section 23(2) of MCOCA is not a sine-qua-non for taking cognizance of a "private complaint".

(v) The Special Court, while dealing with a private complaint under sub-section (1) of Section 9, has the powers of the Magistrate and while trying the accused it will have all the powers of the Court of Session under

sub-section (4) of Section 9 of MCOCA. In other words, the Special Court for taking cognizance of any offence is a Court of original jurisdiction and for trying the accused it functions as a Court of Session.

. The question referred to for our consideration, accordingly, stands answered in aforesaid terms.

91. That takes us to consider each of the petitions/applications transmitted to us by various orders for decision.

(i) In Writ Petition No.127 of 2005, the petitioner has impugned the order dated 10.1.2005 rendered by the Designated Court and has prayed for quashing of the private complaint filed by respondent no.2. The learned Judge, after going through a copy of the complaint and annextures thereto, has directed the Commissioner of Police to take steps as contemplated under section 23 of MCOCA and to appoint a competent police officer to investigate the said complaint. He has further directed investigation under section 156(3) of the Code. We have already expressed the opinion on the question referred to for our consideration. Keeping that in view the impugned order is liable to be quashed and set aside since it is not in consonance with the interpretation of the relevant provisions made by us in this Judgment. We accordingly set aside the judgment and order impugned in the writ petition and direct the concerned Special Court

to consider the complaint filed by respondent no.2 afresh keeping in view the opinion expressed and the conclusions arrived at in this judgment and pass appropriate orders within six weeks from the date of receipt of this judgment. Prayer (b) of the writ petition is rejected. The writ petition is, accordingly, disposed of.

(ii) In Criminal Writ Petition No.1449 of 2005, the order dated 4.5.2005, directing investigation under section 156(3) of the Code passed on the private complaint lodged by respondent no.3, is under challenge. For the selfsame reasons, which we have recorded in the aforesaid sub-paragraph (i), the impugned order dated 4.5.2005 is quashed and set aside. The Special Court to consider the complaint filed by respondent no.3 afresh keeping in view the opinion expressed and the conclusions arrived at in this judgment and pass appropriate orders within six weeks from the date of receipt of this order. It is needless to express that if the investigation pursuant to the impugned order is complete, and the report under section 173(2) of the Code is already forwarded, the Special Court may pass appropriate orders thereon within four weeks from the date of receipt of this order.

(iii) Criminal Application No.6297 of 2005, seeking to intervene in Cri.Writ Petition No.127 of 2005, stands

allowed in view of the fact that the applicant was heard on merits for quite some time. The application is accordingly disposed of.

(iv) In so far as other writ petitions/applications are concerned, in our opinion, those can be decided by the appropriate Bench. We, therefore, direct those petitions/applications to be placed before appropriate Bench for adjudication of the same on merits in accordance with law.

sd/-

(D.B.BHOSALE,J.)

sd/-

(V.K.TAHILRAMANI,J.)

CORAM : V.G.PALSHIKAR Acg.C.J.,

D.B.BHOSALE AND V.K.TAHILRAMANI,JJ.

ORDER:-

. Considering the majority view as also the minority view, in our opinion Writ Petitions are liable to be disposed of in terms of the following:

i) **Writ Petition No.127 of 2005**

Impugned order is set aside. Matter is remitted back to the Special Court for deciding afresh the application before it in the light of majority view.

ii) **Writ Petition No.1449 of 2005**.

Impugned order is set aside. The matter is remitted back to the Special Court for further orders on receipt of the report under Section 156(3) of Criminal Procedure Code.

iii) Interevention Application is disposed of as the Intervenors seeking intervention were heard.

iv) All other petitions/applications should be listed before the concerned Division Bench for decision in the light of majority opinion expressed above. There shall be no order as to costs.

V.G.PALSHIKAR Acg.C.J.,

D.B.BHOSALE,J

V.K.TAHILRAMANI,J.

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